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No. —

In the

Supreme Court of the United States

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL,
Petitioner,

v.

MELISSA JENNINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROY COOPER
North Carolina Attorney General
Christopher G. Browning, Jr., Solicitor General
Thomas J. Ziko,* Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6920
Attorneys for Petitioner

July 9, 2007

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether a university is liable for damages to a student-athlete in an action for sexual harassment under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, for mere emotional distress that did not have any concrete, negative effects and did not have the systemic effect of denying her equal access to an educational program or activity.

2. Whether in an action for sexual harassment under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, a student-athlete can prove that the university was "deliberately indifferent" to discrimination against her when the only notice she gave to the university pertained to her coach's comments to and interactions with *other* players who had not complained.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court of appeals were as follows:

Melissa Jennings was the plaintiff-appellant in the court of appeals.

The University of North Carolina at Chapel Hill (UNC); Anson Dorrance, individually and as women's soccer coach at UNC; William Palladino, individually and as assistant women's soccer coach at UNC; Chris Ducar, individually and as assistant women's soccer coach at UNC; Bill Prentice, individually and as athletic trainer at UNC; Michael K. Hooker, individually and as Chancellor at UNC; Susan Ehringhaus, individually and as assistant to the Chancellor at UNC; Richard A. Baddour, individually and as Director of Athletics for UNC; Beth Miller, individually and as Senior Associate Director of Athletics at UNC; John Swofford, individually and as former Director of Athletics for UNC, were all defendant-appellees in the court of appeals.

The University of North Carolina at Chapel Hill is the party petitioning for *certiorari*. The other defendant-appellees in the court of appeals are not petitioning for *certiorari*.

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PETITION FOR A WRIT OF *CERTIORARI*

The University of North Carolina at Chapel Hill respectfully petitions for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1a) is reported at *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007). The panel opinion of the court of appeals (Pet. App. 74a) is reported at *Jennings v. Univ. of N.C.*, 444 F.3d 255 (4th Cir. 2006). The district court's decision granting defendants' motion for summary judgment (Pet. App. 150a) is reported at *Jennings v. Univ. of N.C.*, 340 F. Supp. 2d 666 (M.D.N.C. 2004).

JURISDICTION

The Court of Appeals entered its judgment on April 9, 2007. (Pet. App. 1a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). (Pet. App. 175a)

STATUTORY PROVISIONS INVOLVED

This case involves Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Pet App. 176a)

STATEMENT OF THE CASE

The women's soccer program at the University of North Carolina at Chapel Hill (UNC) is the premier women's soccer team in the country. Through the spring of 1998, the UNC women's soccer program had won 15 National Championships.

In May 1998, Anson Dorrance, head coach of the women's soccer team, cut Melissa Jennings, a student and third string goalkeeper, for failure to meet the team's expectations on the field, in the classroom and as a teammate. In August 1998, Jennings filed a lawsuit in the United States District Court for the Southern District of Illinois in which she claimed, among other things, that Dorrance intentionally and systematically subjected Jennings to unwelcome sexual harassment and created a hostile environment in the women's soccer program. Jennings further alleged that complaints about Dorrance's conduct were made to University officials, including defendant Susan Ehringhaus, Assistant to the Chancellor and Senior University Counsel. Based on those allegations, Jennings claimed that UNC had violated her rights under Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681, *et seq.*) and that other defendants had violated her rights under 42 U.S.C. § 1983 and the common law.

On defendants' motion, the case was transferred from the Southern District of Illinois to the Middle District of North Carolina. Following transfer, the district court granted defendants' motion to dismiss several, but not all, claims. The district court denied UNC's motion to dismiss the Title IX claim.

The evidence developed during discovery failed to substantiate Jennings' allegations that Dorrance intentionally,

systematically and constantly sexually harassed her. Jennings presented no evidence that Dorrance ever made any sexual proposals to her, touched her, or even attempted to touch her. In her deposition, Jennings admitted that during the two years she was on the team, there were only three incidents when Dorrance spoke to her about her personal life or was present when someone else spoke about her personal life.

On one occasion, Jennings' teammates asked if someone who had attended a game was her boyfriend. Jennings testified that Dorrance was present during that conversation, but she did not remember him saying anything.

On another occasion, prior to a soccer practice, players were talking about their weekend with their boyfriends, which included a comment about a "shag fest" and a boy crawling from the window of one player's room. Dorrance chimed in and teased the players who were talking about the incidents. One of the players then asked, "Well, what about Trim'n [Jennings' nickname]?" -- meaning what about Jennings' relationship with her boyfriend. Dorrance then asked Jennings, "so Trim'n" or "Yes, what about Trim'n?" "Did you have a great weekend?" That is all he said. Jennings testified that she did not respond to Dorrance's question.

The third occasion involved Jennings' performance evaluation in the fall of 1996. Jennings testified that at the end of the soccer season Dorrance met with each player to give a performance evaluation. That year, Jennings' freshman season, the team participated in the NCAA women's soccer championship in Santa Clara, California, and all the player evaluation meetings were held in Dorrance's hotel room.

During his meeting with Jennings, Dorrance was critical of her performance, especially her poor academic performance.

At the time, Jennings' GPA was 1.5 on a 4.0 scale, and she was in danger of losing her academic eligibility to play soccer. Jennings testified that, while trying to determine the cause of her poor academic performance, Dorrance first asked if she was attending the tutoring sessions. He then asked if she was happy at school and asked about her social life. Jennings testified that Dorrance then made a single, crude inquiry about whether she was sexually active, to wit, "Who are you f***ing?" Jennings testified that she immediately told Dorrance, "It was none of his G-- d--- business." Dorrance did not continue his inquiry but instead moved on to discuss Jennings' athletic performance and soccer statistics.

Jennings testified that during her entire two years on the women's soccer team, those are the only three things that Dorrance did to sexually harass her. Everything else that Jennings complains of involved Dorrance's interaction with other players. Some of those interactions Jennings allegedly witnessed herself, some she only heard about, and some she did not learn about until after she had been cut from the team. No player involved in those interactions ever complained to the team captains, the coaches or other University employees or administrators about Dorrance's behavior.

Jennings did testify that in the fall of her freshman year, she arranged a meeting with Susan Ehringhaus, Assistant to the Chancellor and Senior University Counsel, to discuss issues other than alleged sexual harassment. Jennings testified that in response to a general inquiry from Ehringhaus, she told Ehringhaus that Dorrance was exchanging sexual comments with other players during practice. Other than Jennings' testimony about that one meeting, there is no evidence that anybody said anything to anyone about sexual harassment on

the women's soccer team before Jennings was cut from the team. Ehringhaus denied that Jennings ever mentioned sexual harassment on the women's soccer team.

Jennings claims that Dorrance's conduct prevented her from focusing on her studies and affected her grades. The evidence, however, shows that the longer Jennings was on the team, the better she did in school. Starting from a GPA of 1.538 for her fall semester freshman year, Jennings' GPA rose every semester until it reached 2.022 when she was cut from the team. Jennings testified that she believed her athletic performance had improved and, when she met with Dorrance in the spring of 1998, she was not expecting to get cut from the team.

The district court awarded summary judgment to the defendants because the conduct Jennings alleged was not severe, pervasive and objectively offensive to the point of depriving her of educational opportunities. The panel of the Fourth Circuit Court of Appeals affirmed that decision.

After granting Jennings' petition for rehearing *en banc*, the Fourth Circuit reversed the panel decision. In reaching that decision, the court relied upon all evidence of alleged sexual harassment in the record. It did not distinguish between the events that actually involved Dorrance and Jennings and events where she merely witnessed or heard about Dorrance's interactions with other players. Similarly, the court did not distinguish between the events of which Jennings was aware while she was on the team and events which she learned about in litigation.

The Fourth Circuit found that the University was on notice that Jennings was being sexually harassed based upon Jennings' alleged report to Ehringhaus that Dorrance was

exchanging sexual comments with other players. The Fourth Circuit further held that when coupled with her "subpar" performance, Jennings' allegation that Dorrance's comments prevented her from achieving her full academic or athletic potential was enough to defeat defendant's motion for summary judgment. In the Fourth Circuit's opinion, "[a] rational jury could view Jennings as having been denied the full opportunity to achieve her potential as a member of the UNC women's soccer team." 482 F.3d at 707 (Gregory, J. concurring) (Pet. App. 32a). The Fourth Circuit held that Jennings' testimony that she had suffered emotional distress was sufficient to establish that she had suffered a concrete, negative effect on her education.[1]

Judge Gregory, in a concurrence joined by Judge Motz, noted that this was a close and difficult case. In his opinion, Jennings' testimony that her exposure to a sexually harassing environment made it more difficult for her to develop and achieve as a student-athlete was enough to defeat the University's motion for summary judgment. Judge Gregory specifically opined that Jennings could establish a violation of her rights under Title IX if she could prove that her grades rose less than they would have had she not been subjected to a sexually hostile environment.

Judge Niemeyer filed a dissent, in which Judge Williams joined. Judge Niemeyer emphasized that Jennings and the majority relied on incidents that were irrelevant to whether Jennings was sexually harassed. Some of the events occurred

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[1] Jennings did not seek any counseling or psychological care until five and a half years after she filed this lawsuit and then she only sought an expert opinion to support her case, not medical treatment.

before Jennings entered UNC; some incidents Jennings never knew about; and some Jennings learned of only from the testimony given in this case.

Judge Niemeyer disagreed with the majority that evidence of Jennings' exposure to sexual banter between Dorrance and other players denied her educational benefits. *Id.* at 716 (Niemeyer, J., dissenting) (Pet. App. 53a). Judge Niemeyer noted that no court has ever supported a claim for sexual harassment absent evidence of sexual harassment directed at the plaintiff. *Id.* at 720 (Pet. App. 61a). Judge Niemeyer emphasized that "Title IX's purpose is not to eradicate harassment from the educational environment;" rather, Title IX is a specific federal statute structured and designed to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. *Id.* at 717 (Pet. App. 56a). "Title IX protect[s] victims, not witnesses, of harassment." *Id.* at 721 (Pet. App. 63a). Because Title IX was intended to prevent discrimination in education programs and activities, "Jennings must show that she was subjected to harassment – because of her sex – so objectively severe or pervasive that she was effectively denied equal access to UNC's resources and opportunities." *Id.* at 717 (Pet. App. 56a). Judge Niemeyer criticized the majority opinion for permitting Jennings to proceed to trial based on her own conclusory allegation that Dorrance's conduct negatively impacted her academic performance and performance on the soccer field. *Id.* at 718 (Pet. App. 57a).

REASONS FOR GRANTING THE PETITION

This petition provides the Court with the opportunity to determine whether a student-athlete can maintain a Title IX sexual harassment claim when there is no evidence that she suffered any concrete, systemic, negative effect on her educational opportunities as a result of the alleged harassment. In this case, the only evidence of injury was plaintiff's testimony that the alleged harassment so upset her that she does not believe she realized her full academic or athletic potential.

Title IX subjects educational institutions to liability for damages only when, following actual notice that the plaintiff is being sexually harassed, they are deliberately indifferent to sexual harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650-51 (1999).

In *Davis*, the Court held that to state a claim for relief for violation of her rights under Title IX, a plaintiff must show that "the harassment had a concrete, negative effect on [the plaintiff's] ability to receive an education," 526 U.S. at 654, and that the conduct was "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity," 526 U.S. at 652. Although the plaintiff in *Davis* alleged her grades had dropped as she became unable to concentrate on her studies, *id.* at 634, the majority emphasized that "we [do not] contemplate, much less hold, that a mere 'decline in grades is enough to survive' a motion to dismiss" a Title IX claim for sexual harassment, *id.* at 652.

In his dissent, Justice Kennedy focused on the discrepancy between the Court's described standard for liability and the lack of allegations to meet that standard. *Id.* at 677. Justice Kennedy complained that the majority had not provided a workable definition of what a concrete, negative effect of harassment might be. "For example, the majority establishes what sounds like a relatively high threshold for liability – 'denial of equal access' to education – and, almost in the same breath, makes clear that alleging a decline in grades is enough to survive 12(b)(6) and, it follows, to state a winning claim." *Id.* at 677. Justice Kennedy warned that the majority's definition of actionable harassment was so insubstantial and so broad that "untold numbers of lawyers" will easily defeat schools' pretrial motions and subject schools to run-away litigation. *Id.*

The Fourth Circuit's decision is the realization of Justice Kennedy's fears. In this case, there is no evidence that the alleged sexual harassment had any concrete, negative effect on plaintiff's educational opportunities. Plaintiff cannot even show a decline in her grades. Nevertheless, the Fourth Circuit has permitted plaintiff to evade summary judgment simply by testifying that she was so upset by the alleged sexual harassment that she lost her focus – which she claims contributed not to a decline in her performance – but merely to her failure to achieve what she considered to be her full potential as a scholar and athlete.

This case provides the Court with the opportunity to set a clear baseline for determining when sexual harassment has had a concrete, systemic and negative effect on a plaintiff's access to educational programs or activities for purposes of proving a violation of Title IX. Absent further clarification of the

standard for liability, the leaders of thousands of schools, colleges and universities will not know when they have exposed their budgets and endowments to the threat of an uncapped damages award because a student believes that sexually offensive remarks from a faculty member or coach prevented the student from improving his or her grade point average, raising his or her class rank or being Phi Beta Kappa.

This appeal would also allow the Court to resolve an apparent conflict among the circuits on the proof required to establish a violation of Title IX rights. The Second and Fourth Circuits have held that a Title IX claim may proceed to trial when the student alleges that sexual harassment inhibited her from participating more fully in classroom discussions or resulted in her grades not being better. *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 750 (2d Cir. 2003) (professor's sexual harassment discouraged student "from more active involvement in his classroom discussions"); *Jennings*, 482 F.3d at 700 (Pet. App. 20a) (holding that hostile environment "made it difficult for [Jennings] to focus on her studies"). In contrast, the Seventh Circuit has held that mere psychological injury without a concrete, negative effect is not sufficient to defeat a school's motion for summary judgment in a Title IX case. *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 823 (7th Cir. 2003).

In addition, this case provides the Court with the opportunity to clarify whether an educational institution can be held liable for deliberate indifference to sexual harassment when it never received "actual notice" that any student was being discriminated against on the basis of sex. Here, the only notice UNC ever had was that Jennings did not like comments Dorrance was making to *other players* during practices. Sexual

comments do not constitute sexual harassment in violation of Title IX unless they are "so severe, pervasive, and objectively offensive" that they can be said to deprive the victims of access to the educational opportunities or benefits provided by the school on the basis of sex. *Davis,* 526 U.S. at 651. In the context of collegiate athletics, even women's collegiate athletics, Jennings' description of the coach's profanity, cursing, references to women's bodies, crude teasing and joking could not have constituted "actual notice" to the University that its long term and successful women's soccer coach was actually, intentionally discriminating against any of the players on his team on the basis of their sex. This is particularly true in light of the fact that none of the supposed targets of the comments had ever complained.

Furthermore, there is no evidence that *after Jennings told the University of her concerns* she herself was the target of any sexual harassment so severe, pervasive or objectively offensive that it violated her rights under Title IX.

In this case, the Fourth Circuit concluded that UNC could be held liable to Jennings on an implied cause of action under Title IX because UNC did not take any action after Jennings had told a University official that she did not like the sexual comments she heard Dorrance make to other players. The Fourth Circuit reached that decision even though there was no evidence that Jennings herself was subjected to sexual harassment, either before or after she met with the University official, and no evidence that she was ever excluded from or denied access to any educational program or activity. The decision exposes the University to liability despite the fact that it had no actual notice that the coach was discriminating against any players on the women's soccer team on the basis of

their sex. In short, the Fourth Circuit would hold the University liable not for being deliberately indifferent to sexual harassment but for failing to require its women's soccer coach to conduct himself in accordance with the plaintiff's standards of decorum.

If the Fourth Circuit's decision remains the law, it will significantly expand the potential liability of schools, colleges and universities, both public and private, that accept federal funding. The Court should grant *certiorari* to limit educational institutions' potential liability to those cases of intentional sexual discrimination that Congress intended to prohibit.

I. THE DECISION BELOW ALLOWS TITLE IX CASES TO PROCEED TO TRIAL IN THE ABSENCE OF EVIDENCE OF INJURY.

A. The Decision Below Greatly Expands Educational Institutions' Liability for Damages in Title IX Cases.

In this case, the Fourth Circuit held that a college athlete may avoid summary judgment on a Title IX sexual harassment claim despite her inability to present any evidence that the alleged harassment had a concrete, systemic and negative effect on her educational opportunities. The only evidence in this case regarding Jennings' injury from alleged sexual harassment was her testimony that she was so upset by Dorrance's comments and conduct that she was not able to reach her full academic or athletic potential. The concrete evidence in the record, including plaintiff's own testimony, shows that plaintiff's academic performance actually improved while she was on the soccer team. Nevertheless, the Fourth

Circuit denied UNC's motion for summary judgment because, in its opinion, a rational jury could find that Jennings was denied the full opportunity to achieve her potential as a member of the UNC women's soccer team. 482 F.3d at 707 (Pet. App. 33a).

The Fourth Circuit's decision to subject UNC to suit for damages on speculation that Jennings' emotional response to alleged harassment might have kept her from being an all "A" student or a soccer star is contrary to the express wording of Title IX and is at odds with the statutory structure and purpose of Title IX.

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a) (Pet. App. 176a), provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ..

"Congress enacted Title IX in 1972 with two principal objectives in mind: 'to avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.'" *Gebser*, 524 U.S. at 286 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)). The central purpose of Title IX is not to compensate the victims of discrimination but to protect individuals from discriminatory practices carried out by recipients of federal funds. *Gebser*, 524 U.S. at 287.

Because Title IX operates by "conditioning an offer of federal funding on a promise by the recipient not to

discriminate, in what amounts essentially to a contract between the Government and the recipient of funds," *id.* at 286, the parameters of the judicially created, implied private cause of action for damages for violations of Title IX cannot be at odds with the structure and purpose of the statute, *id.* at 284-85. In particular, the implied private cause of action cannot subject an educational institution receiving federal funds to liability for damages under circumstances that Congress did not envision and the recipient institution could not have anticipated at the time it accepted the funding. *Id.* at 287-88. For example, unlike Title VII, Title IX does not permit a plaintiff to pursue a claim for damages against an educational institution on theories of vicarious liability. Instead, the Court has held that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.* at 290.

In *Davis*, the Court addressed the standard for determining when a student has suffered an actionable injury under Title IX. The Court held that in enacting Title IX, Congress intended to condition receipt of federal funds on educational institutions' obligation to protect their students from discriminatory practices which have a concrete negative impact on the students' ability to receive an education. *Davis,* 526 U.S. at 654. The Court specifically emphasized that "the provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." *Id.* at 652.

Particularly important to the issues in this case, the Court

in *Davis* specifically rejected the idea that mere psychological distress, even if that distress allegedly resulted in a decline in grades, is enough to state a claim for sexual harassment under Title IX. *Id.* Instead, the Court held that, to avoid a motion to dismiss, a Title IX plaintiff had to allege she suffered a concrete, negative effect on her ability to receive an education, *id.* at 654, and that the behavior at issue was serious enough to have the systemic effect of denying the victim equal access to an educational program or activity, *id.* at 652.

In *Davis*, the Court did note that teacher-on-student sexual harassment is more likely to violate Title IX. *Id.* at 653. However, the Court did not hold or imply that a student who is an alleged victim of sexual harassment at the hands of a teacher has a lighter burden of proof. The student still has to prove that the teacher's harassment had the concrete, negative effect of systemically denying the student access to an education program or activity. *Id.*

Justice Kennedy dissented from the decision in *Davis*. In his dissent, Justice Kennedy warned that the majority, which appeared to require a plaintiff to prove a "concrete, negative effect" on her ability to receive an education, had not provided a "workable definition" of an actionable claim under Title IX. *Id.* at 677 (Kennedy, J., dissenting). Justice Kennedy specifically criticized the majority for permitting the plaintiff in *Davis* to avoid dismissal of her claim simply by alleging that as a result of sexual harassment her "grades 'dropped' and her 'ability to concentrate on her school work [was] affected.'" *Id.* The majority defended its standards for Title IX liability and rejected Justice Kennedy's fear that its decision was exposing educational institutions to boundless liability:

> The dissent fails to appreciate these very real limitations on a funding recipient's liability under Title IX. . . . Nor do we contemplate, much less hold, that a mere "decline in grades is enough to survive" a motion to dismiss. [526 U.S. at 677 (Kennedy, J., dissenting).] The drop-off in LaShonda's grades provides necessary evidence of a potential link between her education and G.F.'s misconduct, but petitioner's ability to state a cognizable claim here depends equally on the alleged persistence and severity of G.F.'s actions, not to mention the Board's alleged knowledge and deliberate indifference. *We trust that the dissent's characterization of our opinion will not mislead courts to impose more sweeping liability than we read Title IX to require.*

Id. at 652 (emphasis added).

The Fourth Circuit's decision in this case represents the full realization of Justice Kennedy's fears. The Fourth Circuit has permitted plaintiff to avoid summary judgment without any evidence of concrete injury and certainly no evidence that she was systemically denied access to educational programs or activities. Plaintiff's only evidence of injury is her own unsubstantiated testimony that Dorrance's interactions with other players upset her so that she could not focus, and that this affected her academic and athletic performance. Jennings did not present evidence that her grades declined. Her academic transcript shows that her grades improved while she was on the women's soccer team. 482 F.3d at 699-700 (Pet. App. 19a).

Furthermore, there is no concrete evidence that Dorrance's comments affected Jennings' athletic performance. Jennings

was always the last string goalkeeper on the UNC women's soccer team. During her two seasons on the team, she played in one game when UNC was winning in a rout. The goal keeper coaches and Dorrance all testified that Jennings' athletic performance was always poor. In the face of this evidence, all plaintiff could offer was her own conclusory testimony that Dorrance's conduct kept her from reaching her full potential as an athlete. Even then, Jennings testified that she believed her athletic performance had improved over the two seasons she was on the UNC team.

If the decisions in *Gebser* or *Davis* mean anything, the Fourth Circuit's decision in this case cannot be correct. This case provides the Court with the opportunity to clarify whether a student may avoid summary judgment on her Title IX claim merely by providing her own, unsubstantiated testimony that alleged sexual harassment impaired her ability to reach her full potential or instead must present evidence that as a result of sexual harassment she suffered a concrete loss of educational opportunities serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.

B. The Decision Below Is at Odds with the Statutory Structure and Purpose of Title IX.

Title IX, like Title VI, is Spending Clause legislation that creates obligations of a contractual nature between the federal government and educational institutions that accept federal funding. *Gebser*, 524 U.S. at 287-88. Consequently, liability should be imposed under Title IX only if the recipients of federal funds are on notice of (1) the type of activity that the

statute prohibits and (2) conduct that constitutes a violation of these requirements. *See id.* In order for the recipient to exercise a voluntary and knowing choice to accept the obligations Congress envisioned, Congress must set out the conditions for acceptance of the federal funding "unambiguously." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, ___ U.S. ___, 165 L. Ed. 2d 526, 533 (2006) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). States cannot knowingly and voluntarily accept conditions and obligations of which they are "unaware" or are "unable to ascertain."165 L. Ed. 2d at 534.

In *Davis*, this Court held that recipients of federal funding were not liable for damages under Title IX for mere psychological injuries. 526 U.S. at 652. After this assurance that they are liable only for concrete injuries, it no doubt came as a surprise to all the public schools, colleges and universities in the Fourth Circuit that, by accepting federal funding, they have exposed themselves to unlimited liability for damages when a student athlete claims that she was so upset by a coach's sexual comments to other players that she believes it kept her from reaching her full academic or athletic potential. In this respect, the Fourth Circuit's decision is totally divorced from the contractual principles that control the scope of implied private causes of action under Title IX. The Fourth Circuit's decision thus is at odds with the statutory structure and purpose of Title IX.

The Court should accept the petition in order to restore the rights of all public schools, colleges and universities to fair notice of their obligations under Title IX.

C. The Decision Below Creates a Conflict among the Circuit Courts.

The Fourth Circuit is not alone in its error. The Second Circuit Court of Appeals has also held that a student may recover damages for a mere psychological injury.

In *Hayut*, the Second Circuit held that a student who had been the target of sexually harassing comments by a faculty member had stated a claim under Title IX. The Second Circuit held that Title IX required the plaintiff to prove the faculty member's conduct created an educational environment sufficiently hostile as to deprive her of access to educational opportunities or benefits. *Id.* at 750. However, when reviewing the evidence that the plaintiff had been deprived of access to educational opportunities or benefits, the Second Circuit held that the student could avoid summary judgment on her Title IX claim simply by testifying, among other things, that the faculty member's conduct "discouraged [plaintiff] from more active involvement in his classroom discussions" or "simply created a disparately hostile educational environment relative to her peers." *Id.* After *Davis*, it should have been clear that these intangible, psychological injuries are not concrete, negative effects on the plaintiff's education that can be said to be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity as required to state a Title IX claim. The decision in *Hayut* thus suffers from the same error that marks the Fourth Circuit's decision in this case.

The Seventh Circuit Court of Appeals, however, correctly applied the *Davis* holding. In *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817 (7th Cir. 2003), the Seventh Circuit required the plaintiff to

demonstrate that she suffered a concrete, negative effect on her education before she could go forward on her Title IX claim. The Seventh Circuit held that simply being diagnosed with a psychological problem without evidence of falling grades or increased absenteeism was insufficient to deny defendant's motion for summary judgment on her Title IX claim. *Id.* at 823.

This case will provide the Court with the opportunity to resolve the apparent conflict between the Seventh Circuit's decision that *Davis* requires a Title IX plaintiff to prove that the alleged harassment had a concrete, systemic and negative effect on her education and the Fourth and Second Circuits' willingness to expose educational institutions to damages merely because a student testified that her emotional distress prevented her from achieving her full academic or athletic potential.

II. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRIOR HOLDINGS REGARDING A UNIVERSITY'S DUTIES AND OBLIGATIONS UNDER TITLE IX.

In *Gebser* and *Davis*, this Court rejected the use of theories of vicarious liability to impute Title IX liability to educational institutions for sexual misconduct. Instead, the Court explicitly held that educational institutions are liable for alleged sexual harassment only when the institution "itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge." *Davis*, 526 U.S. at 642 (citing *Gebser*, 524 U.S. at 290).

The only evidence that the University had any notice of sexual harassment on the women's soccer team before Jennings was cut from the team was Jennings' testimony regarding her meeting with Ehringhaus, the Chancellor's assistant and legal counsel. Jennings testified that she requested the meeting to speak to Ehringhaus about two concerns. First, she was concerned that Dorrance had not told her teammates that she had missed a game because she had been in the hospital. Her second concern was that Dorrance was encouraging her to attend parties where her teammates were drinking.

After Jennings had covered those issues, Ehringhaus inquired about the atmosphere on the team and what was going on. In response, Jennings testified she told Ehringhaus that there was a "sexually hostile atmosphere at soccer practices." Jennings testified that she told Ehringhaus there was a "humiliating, uncomfortable environment with sexual comments being made." Those comments included crude inquiries about who was having sex with whom and who a player's current sexual partner was.

Jennings did not tell Ehringhaus that Dorrance was directing any sexual comments to her. In fact, at the time Jennings met with Ehringhaus, Dorrance had never made a comment to her of a sexual nature. Jennings described her own relationship with Dorrance at that time as "more comfortable," "nice," and "friendly [in] nature." Furthermore, Jennings had not arranged the meeting in order to make a sexual harassment complaint nor did she consider her conversation with Ehringhaus to be a sexual harassment complaint. Jennings testified she believed her conversation with Ehringhaus was in confidence and its subject would not leave the room.

Other than Jennings' testimony about the 1996 meeting

with Ehringhaus, there is no evidence that prior to May 1998 she or any teammate ever complained that Dorrance was sexually harassing anyone. Only after Dorrance cut Jennings from the team did Jennings' parents complain that Dorrance had sexually harassed Jennings.

The Fourth Circuit held that Jennings' comments to Ehringhaus were sufficient actual notice of sexual harassment to hold the University accountable for injuries suffered as a result of the University's deliberate indifference to Dorrance's sexual harassment. Because the University did not have actual notice that Jennings was being subjected to sexual harassment and Jennings herself did not suffer any sexual harassment as a result of the University's deliberate indifference to her "complaint," the Fourth Circuit's decision is in conflict with both *Gebser* and *Davis*.

A. The Fourth Circuit Failed to Adhere to this Court's Decision in *Gebser*.

In *Gebser*, this Court held "we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference." 524 U.S. at 292-93. In reaching that decision, the Court distinguished Title IX from Title VII and rejected arguments that Title IX permitted plaintiffs to recover damages on theories of vicarious liability such as *respondeat superior*. *Id.* at 286-87.

Jennings' conversation with Ehringhaus in the fall of 1996 did not give the University actual notice that Dorrance was sexually harassing Jennings, or anyone else, such that the University could be held liable for being deliberately

indifferent to violations of Title IX on the women's soccer team.

First, Jennings herself did not intend her conversation with Ehringhaus to constitute notice that Dorrance was sexually harassing anyone. Jennings stated that she understood that the conversation was in confidence and the substance would not go beyond Ehringhaus' office.

Second, this case involves coaches' conduct in college athletics, not faculty discussions in the classroom. As this Court has observed, the context for any sexual comment is critical – a coach is not guilty of severe or pervasive sexual harassment if he smacks a professional football player on the buttocks as the player runs onto the field "even if the same behavior would reasonably be experienced as abusive by the coach's secretary . . . back at the office." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998). Anyone who watches college athletics would not be surprised to learn that some coaches use profanity, curse and humiliate players. In this case, Jennings' concerns about the sexually hostile atmosphere on the soccer team were based on a variety of Dorrance's comments to players which were profane, crude and humiliating but not truly sexual. For example, Jennings thought that Dorrance humiliated and degraded teammates when they made mistakes. Jennings complained that Dorrance would criticize one player by saying she was so smart in class "but she can't f**king pull off a f**king pass." She testified that Dorrance would call players "f**king stupid." While Jennings may have been offended by Dorrance's comments, in the context of practices on college athletic fields, Jennings' description of these kinds of comments would not have given Ehringhaus actual notice that Jennings or any other player on

the women's soccer team was being discriminated against on the basis of her sex.

Third, Jennings admitted that she did not tell Ehringhaus that Dorrance was making any of the comments to her. Jennings told Ehringhaus that Dorrance would make crude inquiries to players about who they were having sex with and who a player's current sexual partner was. However, Jennings had to admit that Dorrance never addressed any of those comments to her. The record also shows that the players would occasionally discuss their sex lives when Dorrance was present, and Jennings admitted there were players who found Dorrance's attention flattering. The record contains testimony from players that they did not find Dorrance's joking and teasing about their personal lives to be offensive. Absent evidence that Dorrance had ever made a sexual comment to Jennings, there was no way for Ehringhaus to determine whether the comments were subjectively unwelcomed or were part of joking or teasing among the players and Dorrance.

In the context of a major college athletic team, where players spend more time with coaches and teammates than anyone else, it is not alarming to learn that coaches and players discuss their personal lives and joke and tease each other about relationships. Although it might not be the best practice for a coach to tease or joke with players about their sexual activities, knowledge that a coach is engaging in such behavior does not constitute knowledge of sexual harassment.

The final deficiency in Jennings' "actual notice" of sexual harassment is the complete absence of any evidence that anything Dorrance said to his players was intended to violate their rights under Title IX and discriminate against them on the basis of their sex. When Jennings spoke to Ehringhaus in the

fall of 1996, Dorrance had been coach of the most successful women's college soccer team for 26 years. During that entire time, none of Dorrance's players had ever complained about sexual harassment on the team. As noted above, playing on a major college athletic team is different from going to a history or biology class. The relationship between a coach and his players is different from that between a faculty member and a student. Even though Jennings testified she told Ehringhaus she was concerned about the sexually hostile environment, there is no evidence in the record that she gave Ehringhaus any reason to believe Dorrance was doing anything because he intended to discriminate against his players because of their sex.

Title IX prohibits discrimination on the "basis of sex." This Court has not defined when offensive conduct is "on the basis of sex." However, the Court has stated that harassment between men and women is not automatically discrimination even when the words used have sexual content or connotations. The Court has said that the critical issue is whether members of one sex are treated differently from members of the other sex. *Oncale*, 523 U.S. at 80.

As Judge Niemeyer notes in his dissent, there is no evidence either that Dorrance treated the women on his team any different from the way he would have treated men or that male college athletes are not subjected to profanity, comments about their bodies or inquiries about their sex lives. Judge Niemeyer concluded that Jennings' claim amounts to nothing more than a complaint about the vulgarity of the pervasive locker room-style talk by teammates and their coach.

Most importantly, there is no evidence that, in her conversation with Ehringhaus, Jennings gave her any reason to believe that Dorrance was discriminating against his players on

his championship, all female, women's soccer team on the basis of their sex. In light of the fact that Jennings was talking about Dorrance's conduct during soccer practice, the fact that it was an all-female team, the fact that she could not say that Dorrance had made any offensive comments to her and the fact that there had been no previous complaints about the long term coach's conduct, there was no evidence that Ehringhaus had "actual notice" that Dorrance was discriminating against anyone on the women's soccer team on the basis of her sex.

In sum, rather than follow this Court's holding in *Gebser* and require proof the University had actual notice that Jennings was being sexually harassed, the Fourth Circuit permitted Jennings to avoid summary judgment by presenting evidence that she told Ehringhaus about Dorrance's comments to other players which Jennings found offensive and humiliating. That conversation simply does not satisfy Jennings' obligation to prove the University had actual notice of sexual harassment such that it can be held liable under the standards this Court established in *Gebser*.

B. The Fourth Circuit Failed to Adhere to this Court's Holding in *Davis*

In *Gebser*, the Court held an educational institution is liable only when its response to actual notice of sexual harassment amounts to deliberate indifference to discrimination. 524 U.S. at 290. In such case, the institution's liability is premised on the official decision not to prevent further violations which result in injury to the plaintiff. *Id.*

Even if Jennings' confidential conversation with Ehringhaus qualified as actual notice that Dorrance was

discriminating against other players on the women's soccer team, the Fourth Circuit failed to follow *Davis* when it permitted Jennings to go forward with her claim with no evidence that the University's failure to act on that notice subjected her to a violation of her rights under Title IX.

Plaintiff's case is notable for the fact that nothing happened to her while she was a member of the women's soccer team. As stated above, during the two years Jennings played on the women's soccer team, Dorrance only made two comments to her that were at all related to sex. No other event relied upon by the Fourth Circuit involved Jennings.

A review of the *en banc* decision reveals that the majority, the concurring judges and the dissenters all note that the majority decision depends upon evidence of events that Jennings did not personally experience or even know about prior to the lawsuit. 482 F.3d at 692 n.1; *id.* at 703 (Gregory, J., concurring); *id.* 708 n.1 (Niemeyer, J., dissenting) (Pet. App. 5a; 26a; 38a). As Judge Niemeyer notes in his dissent, the majority's decision that plaintiff was sexually harassed "rel[ies] on completely irrelevant incidents that occurred even before she entered UNC as a freshman; that she never knew about; and that she learned only from the testimony given in this case." 482 F.3d at 708 (Pet. App. 38a).

All that happened to Jennings after her conversation with Ehringhaus is that she continued to fully participate without incident in all the activities of the women's soccer program. The two comments that Dorrance made to her during her two years on the team do not constitute severe or pervasive sexual harassment actionable under Title IX.

Were Jennings an employee, her mere immersion in an environment which she reasonably deemed to be sexually

harassing would be sufficient to prevail on a sexual harassment claim under Title VII. In *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993), this Court specifically held that Title VII permits a plaintiff to recover damages from working in a discriminatorily hostile or abusive environment even if there were no concrete psychological harm as long as the environment would reasonably be perceived, and is perceived, as hostile or abusive.

The decision in *Harris*, however, stands in stark contrast to the Court's holding in *Davis* that a mere psychological injury, even if allegedly reflected in a decline in grades, is not the kind of concrete, systematic, negative effect on educational opportunities necessary to state a claim for sexual harassment under Title IX. 526 U.S. at 652. Even if the University were found to have been deliberately indifferent to Dorrance's conduct after Jennings' conversation with Ehringhaus in the fall of 1996, Jennings has no evidence that following that conversation she suffered from sexual harassment so severe, pervasive, and objectively offensive that it effectively bars her access to an educational opportunity or benefit. *Id.* at 633.

In this case, the University has never denied that it was aware of its obligation under Title IX to protect plaintiff from intentional discrimination serious enough to have the systemic effect of denying her equal access to an educational program or activity. What the University asserts is it had no actual notice that Dorrance was intentionally discriminating against Jennings, or indeed any other player on the UNC women's soccer team, on the basis of her sex.

In *Gebser*, this Court explicitly stated that the language and structure of Title IX itself mandates that no institution can be held liable in damages unless it makes the official decision

not to take action to remedy a known discrimination on the basis of sex and a plaintiff suffers a subsequent violation as a result of the institution's deliberate indifference to its early knowledge. In this case, Jennings simply did not present sufficient evidence to create an issue of fact as to whether she gave UNC notice of an actual violation of Title IX or as to whether, following that actual notice, the University's deliberate indifference resulted in Dorrance sexually harassing and discriminating against her on the basis of her sex in violation of Title IX.

The unavoidable result of the Fourth Circuit's decision will be to extend educational institutions' liability under Title IX far beyond their clear obligation to protect students from discrimination on the basis of sex. The decision exposes universities to damages simply because they did not protect a student from profanity and crude sexual jokes.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

ROY COOPER
Attorney General

Christopher G. Browning, Jr.
Solicitor General

Thomas J. Ziko*
Special Deputy Attorney General

July 9, 2007

* Counsel of Record

APPENDIX

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MELISSA JENNINGS, Plaintiff-Appellant, and DEBBIE KELLER, Plaintiff,

v.

UNIVERSITY OF NORTH CAROLINA, at Chapel Hill; ANSON DORRANCE, individually and as women's soccer coach at UNC; WILLIAM PALLADINO, individually and as assistant women's soccer coach at UNC; CHRIS DUCAR, individually and as assistant women's soccer coach at UNC; BILL PRENTICE, individually and as athletic trainer at UNC; MICHAEL K. HOOKER, individually and as Chancellor at UNC; SUSAN EHRINGHAUS, individually and as assistant to the Chancellor at UNC; RICHARD A. BADDOUR, individually and as Director of Athletics for UNC; BETH MILLER, individually and as Senior Associate Director of Athletics at UNC; JOHN SWOFFORD, individually and as former Director of Athletics for UNC; ALL DEFENDANTS, Defendants-Appellees.

No. 04-2447

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

482 F.3d 686

October 25, 2006, Argued
April 9, 2007, Decided

OPINION

MICHAEL, Circuit Judge:

Melissa Jennings, a former student and soccer player at the University of North Carolina at Chapel Hill (UNC or the University), claims that her coach, Anson Dorrance, persistently and openly pried into and discussed the sex lives of his players and made sexually charged comments, thereby creating a hostile environment in the women's soccer program. Jennings sued UNC, Dorrance, Susan Ehringhaus (Assistant to the Chancellor and legal counsel to UNC), and several other individuals associated with the University, alleging violations of Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681 *et seq.*), 42 U.S.C. § 1983, and the common law. The district court awarded summary judgment to the defendants. After considering Jennings's appeal en banc, we vacate the summary judgment on her Title IX claim, her § 1983 claim against Dorrance for sexual harassment, and her § 1983 claim against Ehringhaus for sexual harassment based on supervisory liability. The summary judgment on the remaining claims and minor procedural rulings are affirmed.

I.

Because Jennings was the non-movant in the summary judgment proceedings, we recite the facts, with reasonable inferences drawn, in her favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). UNC has the country's most successful women's soccer program at the college level. The UNC team, with Dorrance as head coach, has won the most national championships in the history of the sport. In light of this

record, young women soccer players with exceptional talent covet the opportunity to play on Dorrance's team. Dorrance personally recruited Jennings while she was in high school, and she joined the UNC team at the start of her freshman year in August 1996. Jennings was one of four goalkeepers until Dorrance cut her from the team in May 1998, at the end of her sophomore year. Jennings was seventeen when she started playing for Dorrance, and he was forty-five.

Once Jennings became a member of the UNC team, she was distressed to learn that Dorrance engaged in sexually charged talk in team settings. Dorrance bombarded players with crude questions and comments about their sexual activities and made comments about players' bodies that portrayed them as sexual objects. In addition, Dorrance expressed (once within earshot of Jennings) his sexual fantasies about certain players, and he made, in plain view, inappropriate advances to another. This behavior on Dorrance's part occurred on a regular basis, particularly during team warm-up time at the beginning of practice. The sex-focused talk that Dorrance initiated or encouraged occurred at other times as well, or, as one player put it, "anytime the team was together," whether "on a plane, in a car, or on a bus, in a hotel, at practice, out of town, at events." J.A. 1066. Dorrance subjected Jennings or her teammates to sexually charged inquiries and comments in the following particulars.

In front of the entire team, Dorrance asked one player nearly every day "who [her] fuck of the minute is, fuck of the hour is, fuck of the week [is]," whether there was a "guy [she] ha[dn't] fucked yet," or whether she "got the guys' names as they came to the door or . . . just took a number." J.A. 1237-38, 1261-62. He **[*692]** asked a second player if she was "going

to have sex with the entire lacrosse team," and advised a third, "[Y]ou just have to keep your knees together . . . you can't make it so easy for them." J.A. 1127. Dorrance frequently focused on a fourth player's sex life with questions such as whether she was going to have a "shag fest" when her boyfriend visited and whether she was "going to fuck him and leave him." J.A. 1238, 1248. The coach "direct[ed] inquir[ies]" to a fifth player about the size of her boyfriend's genitalia. J.A. 1452.

During practice Dorrance regularly commented on certain players' bodies, referring to their "nice legs," "nice rack[s]," breasts "bouncing," "asses in spandex," and "top heav[iness]." J.A. 393, 1073, 1229, 1236. Dorrance also called a player "Chuck" (her name was Charlotte) because he believed that she was a lesbian. J.A. 1228. He inquired pointedly in her presence about her sexual orientation, asking "[D]oes she not like the guys?" J.A. 1283.

Dorrance disclosed his sexual fantasies about several players. He told one player, Debbie Keller, that he would "die to be a fly on the wall" the first time her roommate, another team member, had sex. J.A. 1068. Dorrance admitted to Keller the reason for his fascination about how her roommate might react during sex: he believed the young woman "was a very sexual person by nature," yet she was a virgin who was "fighting her inner self" because she was "so religious" (a born-again Christian). J.A. 1070. Another incident in this category occurred during a water break at practice, when Jennings overheard Dorrance tell a trainer that he fantasized about having "an Asian threesome" (group sex) with his Asian players. J.A. 1284-85.

Dorrance did not limit himself to inappropriate speech. He showed overt affection -- affection of the sort that was not welcomed -- for one player, Keller, in front of the entire team. He paid inordinate attention to Keller, frequently brushing her forehead, hugging her, rubbing her back, whispering in her ear, dangling a hand in front of her chest, or touching her stomach. Dorrance took other undue liberties with respect to Keller. For example, during one weight-lifting session when the players were lightly clad, Dorrance called Keller over to him and walked her outside "towards the stadium, putting his arms around her." J.A. 1432. Also, one evening Dorrance telephoned for Keller at home, and one of her roommates (not a soccer player) told him that Keller was out with her boyfriend. Dorrance retorted, "What is she doing, out having sex all over Franklin Street?" J.A. 1073. Dorrance told Keller that he "couldn't hide his affection for [her]" and said that "in a lifetime you should be as intimate with as many people as you can." J.A. 1011.

Jennings listened as Dorrance focused on the sex life of one player after another. [1] **[*693]** Jennings sought desperately

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[1] Jennings herself heard most of the comments recounted above that Dorrance made in front of the team. *See* J.A. 1229, 1236-38, 1248, 1261-62, 1283. The statements that Dorrance asked a particular player whether she was "going to have sex with the entire lacrosse team," J.A. 1127, and that he advised another player "to keep [her] knees together," *id.*, come from Debbie Keller's deposition, as the dissent notes, *see post* at 30 n.1. Nevertheless, Jennings's account of what was occurring is virtually the same. *See e.g.*, J.A. 1238 (Jennings testifying that Dorrance asked a player, "How many guys in the [lacrosse] team did [you] fuck?"). Amy Steelman, who played with Jennings, reported hearing, in a team

(continued...)

to avoid Dorrance's questions and ridicule about her personal life. She therefore tried to "stay out of [his] radar" by not participating in the discussions. J.A. 1242. She was targeted nevertheless. During a fall tournament in California at the end of Jennings's freshman season, Dorrance held one-on-one meetings with players in his hotel room to assess their performance for the season. Dorrance told Jennings that she was in danger of losing her eligibility to play soccer if her grades did not improve. In the midst of this discussion, Dorrance asked Jennings, "Who are you fucking?" J.A. 1330. She replied that it was "[n]one of his God damn business" what she did off field. J.A. 1325. As Jennings described the scene, "I was 17 when he asked me that in a dark hotel room, knee-to-knee, bed not made, sitting at one of those tiny tables." J.A. 1230. She felt acutely uncomfortable.

Jennings again found herself the target of Dorrance's sexual inquiries in a warm-up session during her sophomore year. Some of the players and Dorrance were discussing one player's weekend, called a "shag fest" by Dorrance, which

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[1] (...continued)
setting, Dorrance's question to a player about the size of her boyfriend's genitalia. Jennings did not testify about that incident, but it is nevertheless indicative of Dorrance's pattern of asking abusive questions to a number of different players. With respect to Keller, Jennings heard her say that "she was uncomfortable and didn't like the touching, the affection -- the over-affection she was receiving" from Dorrance. J.A. 1291. Jennings witnessed some of Dorrance's displays of affection toward Keller, observing him "putting his arms around her." J.A. 1432-33. Finally, although Dorrance made the "fly on the wall" comment to Keller before Jennings joined the team, Jennings learned about it because players were still discussing it after she arrived. J.A. 1237.

ended with a young man crawling out of her window. Attention turned to Jennings, who had spent the same weekend with her boyfriend at another school. One player asked, using Jennings's nickname, "[W]ell, what about Trim'n?", J.A. 1246, and Dorrance immediately "chimed in," saying "[Y]es, what about Trim'n?" J.A. 1252. The coach wanted to know whether Jennings had "the same good weekend" as the player whose weekend he had just described as a shag fest. J.A. 1248. Dorrance thus encouraged the interrogation about personal sexual activity to "slide over" to Jennings for several minutes. J.A. 1249, 1254-55. She felt humiliated and refused to respond.

Jennings felt "uncomfortable, filthy and humiliated" by Dorrance's persistent focus on sex and the sexual activities of his players. J.A. 1242. Dorrance's questions and comments moved from girl to girl to girl, putting Jennings in constant fear that she would be his target at some point, as she was. Jennings could not escape the anxiety that she felt and witnessed in others. She saw two players who were specifically targeted by Dorrance react with tears and facial expressions that portrayed feelings of disgust or unhappiness. The player Dorrance called "Chuck" was offended by his open focus on her sexual orientation. J.A. 1282-83. Amy Steelman, a player who was not specifically targeted, was "very uncomfortable with [the] sexually charged environment" that Dorrance had "created and encouraged." J.A. 1452. The environment "was so damaging that it affected [Steelman's] emotional well-being, and [she] would frequently come home crying" from practice. *Id.* Keller's intense discomfort at Dorrance's constant touching and affection was plainly evident from her body language and facial expression. Keller

confirmed that Dorrance's touching and caressing "made [her] skin crawl" and made her "fe[el] dirty." J.A. 1145.

During the fall of her freshman year Jennings notified UNC about the hostile sexual environment that Dorrance had created within the women's soccer program. She lodged a complaint in a meeting with Susan Ehringhaus, legal counsel to the **[*694]** University and Assistant to the Chancellor. Jennings "gave [Ehringhaus] a [complete] run-down" about Dorrance's persistence in talking about players' sex lives when the team was assembled for practice or other activities. J.A. 1343. She reported her feelings of humiliation and discomfort. Ehringhaus dismissed these concerns and suggested that Jennings simply "work it out" with Dorrance. J.A. 1341. Jennings's complaint thus remained unaddressed by the UNC administration.

Jennings stayed on the team until she was cut by Dorrance during exams at the end of her sophomore year. He cited inadequate fitness as the reason. Over the next several days, Jennings's parents submitted several complaints to the Chancellor's office about Dorrance's regular involvement in discussions about the sexual activities of his players. Thereafter, the Director of Athletics, Richard Baddour, conducted an administrative review pursuant to UNC's sexual harassment policy. Dorrance admitted that he participated in group discussions with players about their sex lives, but claimed that his comments were only "of a jesting or teasing nature." J.A. 1531. The review ended with Athletic Director Baddour sending a letter of apology to Jennings's father and a brief, mild letter of reprimand to Dorrance. Baddour wrote to Mr. Jennings on June 9, 1998, apologizing for Dorrance's "inappropriate . . . involvement in [sexual] discussions" with

his team members. J.A. 1531. Dorrance indicated his own apology by counter-signing the letter. One day later, Baddour wrote to Dorrance declaring it "inappropriate for [Dorrance] to have conversations with members of [the] team (individually or in any size group) regarding their sexual activity." J.A. 1533.

In August 1998, at the start of Jennings's junior year, she and Keller brought this action against UNC and several individuals associated with the University, including Dorrance and Ehringhaus, asserting (among others) claims under Title IX and § 1983. After the lawsuit was filed, Jennings was threatened and harassed to the extent that UNC officials warned her that they could not guarantee her safety on campus. At UNC's urging, she spent her senior year at another school and was then awarded a UNC degree. Keller settled her claims and took a dismissal with prejudice. Jennings's case proceeded to the entry of summary judgment in favor of the defendants. She appealed and a divided panel of this court affirmed the judgment. *Jennings v. Univ. of N.C., at Chapel Hill,* 444 F.3d 255 (4th Cir. 2006). We vacated the panel decision and reheard the case en banc. Our review of the district court's grant of summary judgment is de novo. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283 (4th Cir. 2004) (*en banc*).

II.

Jennings claims that UNC discriminated against her in violation of Title IX by allowing Dorrance, the women's soccer coach, to subject her to severe and pervasive sexual harassment in the women's soccer program. Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Discrimination under Title IX includes coach-on-student sexual harassment that creates a hostile environment in a school sports program. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992) (stating that teacher's sexual harassment of student is covered by Title IX). A private right of action against the institution is implied under Title IX, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709, 99 S. Ct. 1946, **[*695]** 60 L. Ed. 2d 560 (1979), and money damages are available as a remedy, *Franklin*, 503 U.S. at 76.

To establish a Title IX claim on the basis of sexual harassment, a plaintiff must show that (1) she was a student at an educational institution receiving federal funds, (2) she was subjected to harassment based on her sex, (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity, and (4) there is a basis for imputing liability to the institution. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002). We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999); *Franklin*, 503 U.S. at 75.

A.

Jennings can establish the first element of her Title IX claim without dispute: she was a student at UNC, an institution receiving federal funds. On the second element of her claim, Jennings must proffer facts showing that Dorrance subjected

her to harassment (verbal in this case) based on her sex. *See* 20 U.S.C. § 1681(a). Sexual harassment occurs when the victim is subjected to sex-specific language that is aimed to humiliate, ridicule, or intimidate. *See Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331-32 (4th Cir. 2003). A coach's sexually charged comments in a team setting, even if not directed specifically to the plaintiff, are relevant to determining whether the plaintiff was subjected to sex-based harassment. *See Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 184 (4th Cir. 2001) (considering, in Title VII case, hostile comments concerning African Americans in general as well as similar comments directed specifically toward plaintiff).

UNC argues that Dorrance's sex-focused comments were "of a joking and teasing nature" that did not amount to sexual harassment. Appellees' Br. at 22; *see Faragher v. City of Boca Raton,* 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (noting that "simple teasing [and] offhand comments" do not amount to sexual harassment) (internal quotation marks and citation omitted). The facts, when viewed in the light most favorable to Jennings, show that Dorrance's persistent, sex-oriented discussions, both in team settings and in private, were degrading and humiliating to his players because they were women. His conduct went far beyond simple teasing and qualified as sexual harassment. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993); *Ocheltree,* 335 F.3d at 332.

Dorrance, in front of the entire team, frequently singled out individual players to find out whether, with whom, and how often they were having sex. He put the questions crudely and bluntly, asking, for example, "[Who is your] fuck of the week[?]", J.A. 1237, "[Are you] going to fuck [your boyfriend] and leave him[?]", J.A. 1248, and "How many guys in the [lacrosse] team did [you] fuck?", J.A. 1238. As Jennings expected, Dorrance ultimately asked her (albeit in private) a similar question, "Who are you fucking?" J.A. 1330. Dorrance even asked one player about the size of her boyfriend's genitalia and suggested to another that she "just had to keep [her] knees together." J.A. 1127. Dorrance fixated on one player's large breasts, pronouncing that they made her **[*696]** top-heavy and gave her poor balance. These sorts of questions and comments, which frequently carried the strong suggestion of promiscuity, provoked in several players acute feelings of humiliation and degradation that were directly linked to their gender. The nature of Dorrance's language, in other words, establishes that he was targeting the young women because of their sex. *See Ocheltree*, 335 F.3d at 332. Finally, Dorrance's reckless comments about his sexual fantasies -- to a trainer that he would like to have group sex with his Asian players and to Debbie Keller that he would like to be a fly on the wall the first time one player had sex -- assist in demonstrating that his pronounced interest in discussing his players' sex lives transcended simple teasing or joking. In short, Jennings proffers sufficient facts for a jury to find that Dorrance subjected her to sexual harassment.

B.

We next consider whether Jennings proffers facts to permit a finding that Dorrance's sex-based harassment was sufficiently

severe or pervasive to create a hostile or abusive environment in the women's soccer program. Harassment reaches the sufficiently severe or pervasive level when it creates "an environment that a reasonable person would find hostile or abusive" and that the victim herself "subjectively perceive[s] . . . to be abusive." *Harris,* 510 U.S. at 21. Whether gender-oriented harassment amounts to actionable (severe or pervasive) discrimination "depends on a constellation of surrounding circumstances, expectations, and relationships." *Davis,* 526 U.S. at 651 (quoting *Oncale,* 523 U.S. at 82). All the circumstances are examined, including the positions and ages of the harasser and victim, whether the harassment was frequent, severe, humiliating, or physically threatening, and whether it effectively deprived the victim of educational opportunities or benefits. *See Davis,* 526 U.S. at 650-51; *Harris,* 510 U.S. at 23. Evidence of a general atmosphere of hostility toward those of the plaintiff's gender is considered in the examination of all the circumstances. *See Harris,* 510 U.S. at 19 (considering harassment directed at both plaintiff and her female co-workers); *see also Spriggs,* 242 F.3d at 184 (stating that, "We are, after all, concerned with the 'environment' of . . . hostility, and whatever the contours of one's environment, they surely may exceed the individual dynamic between the complainant and [her harasser]."). These standards for judging hostility ensure that Title IX does not become a "general civility code." *See Oncale,* 523 U.S. at 80. "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminat[ion]." *Faragher,* 524 U.S. at 788 (internal quotation marks omitted). "Common sense, and an appropriate sensitivity to social context, will enable courts and juries" to identify objectively hostile or abusive conduct. *Oncale,* 523 U.S. at 81-82. Here, a jury could reasonably find that Dorrance's persistent sexual

harassment was sufficiently degrading to young women to create a hostile or abusive environment.

Dorrance was not just any college coach. He was and still is the most successful women's soccer coach in U.S. college history, and he has coached the national team. Dorrance thus had tremendous power and influence over a player's opportunity for achievement in the soccer world, both at UNC and beyond. As Jennings put it, "[g]irls would cut off their right arm to be [at UNC]" and play for Dorrance. J.A. 1227. Dorrance encouraged his players to confide in him about all aspects of their personal lives, including the details of their **[*697]** sexual activities. He professed to them that he wanted to be a father figure. In reality, Dorrance abused his power as coach to ask his players questions a father would not ask; he pried into and talked openly about his players' sex lives in a way that was disrespectful and degrading. The disparity in power between Dorrance and his players trapped players into responding to his questions and enduring the environment. *See Crandall v. N.Y. College of Osteopathic Med.*, 87 F. Supp. 2d 304, 319 (S.D.N.Y. 2000) (denying summary judgment in part because "unequal power relationship" between harasser and victim could support a jury finding of a sexually hostile environment). As the coach, Dorrance controlled everything: team membership, position, playing time, and scholarship eligibility. Even Debbie Keller, the team captain and a star player, was acutely mindful of Dorrance's enormous power and influence, and she took care not to provoke him. Keller was troubled by Dorrance's persistent focus on sex. "[A]ll [of his] comments about his affection" for her, together with the inappropriate touching, "made [her] skin crawl" and made her "fe[el] dirty." J.A. 1145. Dorrance's conduct put constant pressure on Keller because she "didn't want to tick him off to

a point . . . where he would take it out on [her] by not playing [her]." J.A. 1120. Jennings similarly described the pressure on players to submit to Dorrance's excessive intrusion into their sex lives: "[H]ow do you say anything [to stop him?] . . . You are stuck between a rock and a hard place." J.A. 1290.

Any age disparity between the harasser and his victim is also relevant to gauging whether there was a hostile or abusive sexual environment. *Davis*, 526 U.S. at 651. Here, Dorrance was a forty-five-year-old man probing into and commenting about the sexual activities of young women, some of whom, like Jennings, were as young as seventeen. Indeed, Jennings felt the extra pressure of age difference when Dorrance called her to his California hotel room to assess her performance as a freshman player. Jennings describes the scene: "I was 17 when he asked me ['Who are you fucking?'] in a dark hotel room, knee-to-knee, bed not made, sitting at one of those tiny tables." J.A. 1230.

Jennings had good reason to fear that she too would be targeted by Dorrance, for he had subjected her to a general environment of sexual harassment. She had witnessed his degrading and persistent focus on the sex lives of other players. She observed Dorrance's sex-based humiliation of several of her teammates, and she heard his demeaning comments. Dorrance openly accused at least three players of being promiscuous, asking them degrading questions such as, "Is there a guy you haven't fucked yet?". J.A. 1261-62. Dorrance turned news about visits by boyfriends into speculation about rampant sex. Thus, he asked one player whether she was going to have a "shag fest" when her boyfriend visited, and whether she was "going to fuck him and leave him." J.A. 1248.

No aspect of his players' sex lives appeared off limits for Dorrance. He asked one player about the size of her boyfriend's genitalia. He mocked a lesbian player by calling her "Chuck" and asking in front of the team why "she [did] not like the guys." J.A. 1283. He expressed his fantasies to a trainer about wanting to have group sex with his Asian players (this Jennings overheard) and to Keller about his voyeuristic interest in watching the first time one player, whom Dorrance believed was a virgin with repressed sexual desire, had intercourse. These two private incidents together with overt displays of affection toward Keller and his graphic comments about the "nice rack[s]" or "nice legs" of certain players, J.A. 1229, 1236, **[*698]** indicate that Dorrance viewed at least some of his players as sexual objects.

Dorrance's sex-based verbal abuse permeated team settings. It is described by players as occurring frequently, often during team warm-up time, on a typical Monday afternoon (the first practice date after the weekend), or any time the team was together, whether at home or traveling. According to Jennings, two players in particular were targeted with humiliating comments or questions about their sex lives almost every day or every other day.

Dorrance's persistent talk about his players' sex lives caused Jennings to live in constant fear that he would at some point direct his "filthy comments" at her, as he shifted his focus from player to player. J.A. 1243. Jennings tried to stay off of Dorrance's "radar" when he was on the topic of sex, J.A. 1242, but she was nevertheless targeted in the team setting. Thus, in a team warm-up session during Jennings's sophomore year, Dorrance asked whether Jennings had had "the same good weekend" with her boyfriend as a player whose weekend he

had just described as a "shag fest." J.A. 1248. Jennings was humiliated by this question and did not respond. A jury could reasonably find that Dorrance's two incidents (the hotel room encounter being the first) of direct harassment of Jennings were more abusive in light of the general, sexually charged environment. In other words, the incidents were not isolated events, but were part of an abusive pattern that instilled fear and dread.

The sexually charged atmosphere perpetuated by Dorrance left other players besides Jennings with feelings of humiliation and discomfort. Keller was repulsed by Dorrance's inappropriate touching, and she regarded it as "kind of sick" when he told her he "want[ed] to watch [her] friend have sex." J.A. 1069. Amy Steelman "was shocked by the pervasive and frequent [sexual] discussions" that Dorrance "frequently provoked" and "always encouraged;" she felt "very uncomfortable with his sexually charged environment," and she "would frequently [go] home crying" as a result. J.A. 1452. Both Jennings and Steelman observed that Dorrance's comments visibly upset other players as well. One, who was constantly portrayed by Dorrance as sexually promiscuous, was reduced to tears as a result of his accusations. Still another got an upset or disgusted look on her face after Dorrance focused on her breasts (her "rack," as he put it) and called her top heavy. J.A. 1270-71. A lesbian player, whose sexual orientation was highlighted by Dorrance, was noticeably bothered by this attention. Evidence that other players shared Jennings's humiliation and discomfort assists in showing that she was objectively reasonable in finding the environment hostile and abusive. *Cf. Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 747 (2d Cir. 2003) (characterizing reactions of plaintiff's peers to conduct directed at plaintiff as "significant to the

mandated objective analysis" of whether conduct was sufficiently severe to be actionable under Title IX).

In sum, Jennings has proffered sufficient facts for a jury to find that Dorrance's degrading and humiliating conduct was sufficiently severe or pervasive to create a sexually hostile environment. This conclusion takes into account the informal, sometimes jocular, college sports team atmosphere that fosters familiarity and close relationships between coaches and players. A male coach might use sexual slang in front of his women players, and the players might do the same in front of the coach. Title IX is not a civility code for the male coach who coaches women, and it is not meant to punish such a coach for off-color language that is not aimed to degrade or intimidate. What happened in **[*699]** this case, if Jennings's version of the facts is believed, is that Dorrance took advantage of the informal team setting to cross the line and engage in real sexual harassment that created a hostile or abusive environment.

A Title IX plaintiff completes her hostile environment showing at the summary judgment stage if, based on her proffered evidence, the sexual harassment "*can be said* to deprive [her] of access to . . . educational opportunities or benefits." *Davis, 526 U.S. at 650* (emphasis added). *Davis* explains that a sexual harassment victim "can be said" to have been deprived of access to educational opportunities or benefits in several circumstances, including when the harassment (1) results in the physical exclusion of the victim from an educational program or activity; (2) "so undermines and detracts from the victim['s] educational experience" as to "effectively den[y her] equal access to an institution's resources and opportunities"; or (3) has "a concrete, negative effect on

[the victim's] ability" to participate in an educational program or activity. *Id.* at 650-51, 654.[2] These alternative ways of showing deprivation or harm are rooted in the statute. Specifically, Title IX states that a covered institution cannot, on the basis of sex, (1) "exclude[] [a person] from participation in," (2) "den[y] [a person] the benefits of," or (3) subject[] [a person] to discrimination under any education program or activity." 20 U.S.C. § 1681(a). *Davis* hews to the statute in pointing out that sexual harassment reaches the level of actionable discrimination when it has "a concrete, negative effect on [the victim's] ability" to participate in a program or activity. *See Davis,* 526 U.S. at 654. Thus, in relying on *Davis's* "concrete, negative effect" language in the discussion that follows, we have neither gutted that case's deprivation standard nor contravened the text of the statute, as the dissent suggests. *See post* at 45. In all events, the burden of showing a concrete, negative effect is sufficiently rigorous. It is, in simple terms, an effect that is concrete (or real), negative, and substantial.

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[2] *Davis*'s deprivation standard was formulated in the context of student-on-student harassment. The Supreme Court thus recognized "the practical realities [faced by a school in] responding to student behavior," noting that "children may regularly interact in a manner that would be unacceptable among adults." *Davis,* 526 U.S. at 651, 653. The Court expressly acknowledged that "[t]he relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee . . . and to have a systemic effect on a program or activity." *Id.* at 653. Student-on-student "harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment" or coach-student harassment. *Id.*

Jennings has met the burden here with evidence showing that Dorrance's severe and pervasive sexual harassment concretely and negatively affected her ability to participate in the soccer program. She testified that the hostile atmosphere created by Dorrance made her feel humiliated, anxious, and uncomfortable; these effects, in turn, had a negative impact on her participation and performance in soccer and on her academic performance. Jennings's testimony is supported by a psychiatrist's opinion that Dorrance's destructive practice of verbal sexual abuse caused her to suffer severe emotional distress.

The dissent suggests that the slight improvements in Jennings's grades, her belief that she was improving as a player, and her surprise and disappointment at being cut do not depict a player who has been effectively "denied the educational opportunity of playing on the team." *Post* at 52. This evidence does not prevent Jennings from establishing that she has a **[*700]** triable issue on the last part of the hostile environment element of her Title IX claim. If anything, it shows how hard Jennings was trying, and what she believed she was achieving, in spite of the hostile environment. When Dorrance cut Jennings from the team *in the middle of exams* in May 1998, her cumulative GPA was 1.964, below passing. When she finished exams, and the grades were recorded, her GPA was 2.022, barely above passing. This subpar academic performance gives substance to Jennings's testimony that her GPA was so low because the hostile soccer environment made it difficult for her to focus on her studies.

Likewise, Jennings's acknowledgment that she was disappointed at being cut does not, at the summary judgment stage, defeat her evidence that she was harmed by the hostile

environment, both emotionally and in her performance as a player. Jennings was understandably disappointed because she had lost the opportunity to play on the country's premier women's college soccer team. Her disappointment, however, does not detract from the fact that she had to endure sexual harassment in order to play. A jury could reasonably find that the harassment interfered substantially with Jennings's ability to participate in the soccer program, notwithstanding her desire to stay on the team. At practice, for example, Jennings was in constant fear that Dorrance would direct his questions about sexual activities to her. This prompted her to concentrate on "stay[ing] out of [Dorrance's] radar" when he was on the subject of sex. J.A. 1242. This surely had a negative effect on her ability to concentrate on soccer. Moreover, the general, sex-charged environment that Dorrance perpetuated caused Jennings to feel humiliated, anxious, and uncomfortable. A jury could reasonably agree with her that the burden of these feelings had a "negative[] impact[]" on her "performance on the soccer field." J.A. 1585. In sum, a jury could find that the total impact of Dorrance's severe and pervasive harassment, including the severe emotional distress it caused Jennings to suffer, had a concrete, negative effect on her ability to participate in the soccer program.

C.

Finally, Jennings must provide a basis for imputing liability to UNC for Dorrance's conduct. An institution can be held liable for a Title IX violation only if "an official who . . . has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination in the [institution's] programs and fails adequately to respond" or displays "deliberate indifference" to

discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).

Jennings's facts show that in the fall of 1996 Jennings met with Susan Ehringhaus, Assistant to the Chancellor and counsel to the University. Ehringhaus was UNC's highest ranking lawyer and an official responsible for fielding sexual harassment complaints. Jennings informed Ehringhaus that Dorrance had created an abusive environment in the women's soccer program. Ehringhaus was given vivid details of Dorrance's sexual comments about his players when the team was together. Jennings also reported that the situation was causing her intense feelings of discomfort and humiliation. Ehringhaus dismissed this complaint by telling Jennings that Dorrance was a "great guy" and that she should work out her problems directly with him. J.A. 1341-42. Ehringhaus took no action on the complaint, and Dorrance's harassment continued. These facts are sufficient to establish that Jennings gave Ehringhaus, and by extension UNC, actual notice of the hostile environment created **[*701]** by Dorrance. This notice and the University's failure to take any action to remedy the situation would allow a rational jury to find deliberate indifference to ongoing discrimination.

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For the foregoing reasons, Jennings has presented sufficient evidence to raise triable questions of fact on all disputed elements of her Title IX claim against UNC, and the district court erred in granting the University's motion for summary judgment.

III.

Jennings asserts § 1983 claims for sexual harassment against Dorrance, Ehringhaus, and several other individuals who were employed by UNC. These defendants, according to Jennings, acted "under color of" state law to deprive her of "rights, privileges or immunities secured by the Constitution and laws" of the United States, 42 U.S.C. § 1983, specifically her *Fourteenth Amendment* equal protection right to be free from sexual harassment in an educational setting, *see Hayut*, 352 F.3d at 743-44. The district court granted summary judgment to all of the individual defendants on these claims, but we conclude that Jennings has triable claims against Dorrance and Ehringhaus.

To survive Dorrance's motion for summary judgment on her § 1983 sexual harassment claim against him, Jennings must show that he was a state actor, he harassed her because of sex, and the harassment was sufficiently severe or pervasive to interfere unreasonably with her educational activities. *See Id.* at 744 (explaining that § 1983 sexual harassment claims based on a hostile environment theory "are governed by traditional Title VII . . . jurisprudence"). First, "'[s]tate employment is generally sufficient to render the defendant a state actor,'" and a defendant necessarily "acts under color of state law when he abuses the position given to him by the State." *West v. Atkins*, 487 U.S. 42, 49-50, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 n.18, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)). As we spell out in detail in part II, *supra*, Jennings has proffered evidence (1) that Dorrance was a state actor, functioning in his capacity as a coach, when he engaged in sexual harassment and (2) that the harassment was sufficiently severe or pervasive to interfere

with her educational activities. The district court therefore erred in granting summary judgment to Dorrance on the § 1983 claim for sexual harassment.

The district court correctly granted summary judgment on identical § 1983 claims against three of Dorrance's subordinates, assistant coaches William Palladino and Chris Ducar, and the athletic trainer, Bill Prentice. Jennings has not offered evidence that the three subordinates participated in sexual harassment.

Jennings's § 1983 claim against Ehringhaus is based on the theory of supervisory liability. *See Baynard v. Malone*, 268 F.3d 228, 235 (4th Cir. 2001) ("It is well settled that 'supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates.'" (quoting *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994)). Jennings proffers evidence that Ehringhaus, as an administrative official with authority to take action against Dorrance, failed to act and thereby allowed Dorrance's sexual harassment to continue unchecked. More specifically, Jennings's evidence would allow a jury to find that Ehringhaus had actual knowledge of Dorrance's misconduct; that her response was "so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices"; **[*702]** and that there exists "an affirmative causal link" between Ehringhaus's inaction and Jennings's constitutional injury. *See Baynard*, 268 F.3d at 235 (quoting *Shaw*, 13 F.3d at 799). Ehringhaus is therefore not entitled to summary judgment on Jennings's § 1983 claim against her for supervisory liability.

Summary judgment on this claim was properly awarded to the estate of Michael Hooker (former UNC Chancellor) and to other current or past UNC officials, Richard Baddour, Beth Miller, and John Swofford. There is no evidence that any of these officials learned of Dorrance's behavior until Jennings was cut from the team. Nor does Jennings suggest that these individuals supported any official policy that enabled the harassment.

Dorrance and Ehringhaus have preserved the issue of qualified immunity. In their summary judgment papers the individual defendants raised qualified immunity as a defense on the § 1983 claims, but gave the issue secondary attention. The district court did not address the question. On appeal the defendants assert qualified immunity as an alternative argument, again giving the matter limited treatment. These circumstances prompt us to decline to consider the question, and thus allow the district court to address it in the first instance on remand. *See Brown v. United States*, 851 F.2d 615, 620 (3d Cir. 1988) (declining to exercise the power to consider qualified immunity in the first instance on appeal).

IV.

The remaining issues raised by Jennings may be dealt with in short fashion. She argues that the district court erred in awarding summary judgment to the individual defendants on her constitutional right to privacy claim brought under § 1983 and to Dorrance on her common law privacy claim. Here, we affirm the district court because none of the defendants either required Jennings to disclose personal information or invaded her records to discover such information. *Cf. Thorne v. City of El Segundo*, 726 F.2d 459, 468-69 (9th Cir. 1983) (finding

a constitutional violation where a public job applicant was required to answer questions about her sexual activity as a condition of employment); *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76, 90 (N.C. Ct. App. 2002) (stating that the privacy invasion tort includes intrusions such as trespassing, eavesdropping, and peeping into windows). Finally, Jennings argues that the district court erred in denying two of her motions: (1) the motion to strike the defendants' answer on the ground that their denial of one allegation in the complaint was inconsistent with Dorrance's deposition testimony, and (2) the motion to strike, as not properly authenticated, certain exhibits (team records) accompanying Dorrance's affidavit. After considering the arguments and materials relating to these motions, we conclude that the district court did not abuse its discretion in denying them.

V.

For the reasons stated above, we vacate the district court's grant of summary judgment on Jennings's Title IX claim against UNC, her § 1983 claim against Dorrance for sexual harassment, and her § 1983 claim against Ehringhaus for sexual harassment based on supervisory liability. We affirm the grant of summary judgment on Jennings's remaining claims against the individual defendants, and we affirm the procedural rulings. The case is remanded for further proceedings on the open Title IX and § 1983 claims.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

CONCUR

[*703] GREGORY, Circuit Judge, concurring:

This appeal presents the difficult issue of whether an admittedly inappropriate environment created by a women's collegiate soccer coach was sufficiently hostile to deprive a player of the benefits of or participation in the team or her education. Because I believe that Melissa Jennings has presented enough evidence, when viewed in the light most favorable to her, to create a triable issue of fact on her Title IX claim, I vote to reverse the district court's grant of summary judgment. I write separately from the thoughtful majority opinion to express additional thoughts and to respond to specific arguments raised in the well-written dissent.

I.

I agree with the majority that Anson Dorrance's sexually explicit, inappropriate, and harassing comments directed to other players on the team, but overheard by Jennings, are relevant to determining whether Jennings was subjected to a hostile environment. * *See ante* at 11. Although the majority

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* I agree with the majority that we may consider comments: (1) made in Jennings's presence; (2) made outside her presence, but consistent with her account; and (3) made before her tenure on the team, but discussed in her presence. *Cf. Schwapp v. Town of Avon*, 118 F.3d 106, 110-12 (2d Cir. 1997) ("[I]ncidents . . . occurring before [plaintiff's] tenure may be of limited probative value, but cannot be ignored on summary judgment."); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) (stating that in reviewing hostile environment claim courts may consider "the (continued...)

of hostile environment cases involve conduct directed at the plaintiff, unlike the dissent, I do not find evidence that "the Supreme Court itself has assumed throughout its Title VII and Title IX cases that only harassment *directed* and *targeted* at the victim was capable of creating a hostile environment." *Post* at 48. *Meritor Savings Bank, FSB v. Vinson* held that hostile environment claims were cognizable under Title VII because the Act "affords employees the right to work in *an environment* free from discriminatory intimidation, ridicule, and insult." 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) (emphasis added). *Meritor* cited *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), a case recognizing a hostile environment as potentially violative of Title VII where the employer provided discriminatory service to its Hispanic clientele rather than any direct action against its Hispanic employees. Further, the Circuit Court opinion in *Meritor* explicitly recognized that "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive." *Vinson v. Taylor*, 243 U.S. App. D.C. 323, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd in relevant part, rev'd in part, Meritor*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49.

This view fully accords with this Circuit's decision in *Spriggs v. Diamond Auto Glass*, a hostile environment case where we noted that "[w]e are, after all, concerned with the 'environment' of workplace hostility, and whatever the contours

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* (...continued)
lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction to its environs").

of one's environment, they surely may exceed the individual dynamic between the complainant and his supervisor." 242 F.3d 179, 184 (4th Cir. 2001) (citing *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) ("[R]acist attacks need not be directed at the complainant in order to create a hostile educational environment."); *Vinson*, 753 F.2d at 146; *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 n.2 (11th Cir. 1982) ("The fact that many of the epithets were not directed at **[*704]** [the plaintiff] is not determinative. The offensive language often was used in [his] presence after he had voiced objections to [his employer].")); *accord Jackson v. Quanex Corp.*, 191 F.3d 647, 660-61 (6th Cir. 1999) (noting that the court may consider employer conduct directed towards entire minority group, even in individual Title VII action, and that such conduct was relevant to question of whether environment was subjectively and objectively hostile); *Schwapp*, 118 F.3d at 111 ("Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment, the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment." (citation omitted)); *Edwards v. Wallace Community College*, 49 F.3d 1517, 1522 (11th Cir. 1995) ("A plaintiff may have a viable hostile environment claim even if the racial remarks were not directed at her.").

As the majority explains, Dorrance's comments may have singled out individual players at any given practice, but his actions created a "general environment of sexual harassment," *ante* at 12, where young women under his control were the subject of humiliating and degrading comments, frequently on the basis of their alleged promiscuity, *see ante* at 10. I believe that a rational jury could find that this environment, which

included the two specific incidents directed toward Jennings, constituted a pervasive hostile environment. Drawing inferences in Jennings's favor, a rational jury could find that Jennings "live[d] in constant fear" that Dorrance would turn his attention to her. *Ante* at 13. Indeed, this fear became a reality during the encounter between Jennings and Dorrance in a hotel room at the end of her freshman year.

II.

I agree with the dissent that Dorrance's hotel-room inquiry to Jennings was plainly vulgar. The dissent concludes, however, that the question was "obviously an inquiry about what was occupying Jennings' time." *Post* at 50. While I agree that a coach would inquire as to whether a player was having personal problems, on this record, taking inferences in Jennings's favor, I do not think we can conclude as a matter of law that the question was "not made in an attempt to humiliate, degrade, and demean." *Post* at 50.

First, as the majority notes, Dorrance's remarks to his players "frequently carried the strong suggestion of promiscuity," *ante* at 10, often employing the same vulgar construction he used with Jennings. He asked players who their "fuck of the week" was, J.A. 1237, if a certain player was "going to fuck [her boyfriend] and leave him," J.A. 1248, and another player, "[h]ow many guys in the [lacrosse] team did [she] fuck," J.A. 1238. Because Jennings had heard those remarks and practiced her sport in the abusive environment engendered by them, a rational jury could conclude that Dorrance's hotel-room inquiry was an attempt to humiliate, degrade, and demean her on the basis of sex. Furthermore, Dorrance's question assumed that Jennings was engaged in a

sexual relationship, unlike a question that would have simply asked whether she was having "boy" or "relationship" problems. To Jennings, the assumption that she was engaged in sexual relations at all offended. *See* J.A. 1332 ("[Dorrance] asking me if I'm fucking anybody would be the assumption of . . . . I don't think anybody would ask that question, unless you are assuming they already had sexual relationships."). In all candor, it is a close issue whether Jennings's subjective view meets the objective standard. In this case, however, I [*705] believe that a rational jury could find the remark objectively offensive because of the age difference between Dorrance and Jennings, Dorrance's position of power and trust, and, most importantly, the link between Dorrance's knowledge of whether a player engaged in sexual activity and his harassment implying that player's promiscuity.

Finally, omitted from both the majority and dissent's version of the hotel-room conversation, is the fact that Dorrance, directly after asking Jennings with whom she was having sex, commented that Jennings should feel comfortable sharing things with him--even things she could not share with her father--because he was like a father figure. J.A. 1325. Given this comment and Jennings's knowledge that Dorrance showed open affection for a fellow team member (Debbie Keller), I do not believe that as a matter of law Dorrance's question was not "focus[ed] on sex" and not posed because of Jennings's gender. *Post* at 50; *see Wills v. Brown Univ.*, 184 F.3d 20, 39 (1st Cir. 1999) (Lipez, J., dissenting) (recounting facts of case involving college professor telling student "I want to be close to you like father-daughter," during study sessions that included professor fondling student).

In sum, while the hotel-room remark can be viewed as a mere poorly phrased inquiry from a coach to a player about whether relationship problems were interfering with her athletic performance, such a conclusion would require us to draw inferences in favor of Dorrance, contrary to our standard of review. Taking into account the factors discussed above, a rational jury could conclude that Dorrance's vulgar inquiry was sexual harassment and "part of an abusive pattern that instilled fear and dread." *Ante* at 14.

III.

As noted by the majority, a Title IX plaintiff must proffer evidence that the hostile or abusive nature of the environment "ha[d] 'a concrete, negative effect on [the victim's] ability' to participate in an educational program or activity." *Ante* at 15-16 (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650-51, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)). In this case, the proper inquiry is whether the record contains enough evidence to allow a rational jury to conclude that the hostile environment created by Dorrance effectively denied Jennings the benefits of membership on the women's soccer team and enrollment at the University of North Carolina at Chapel Hill ("UNC") by making it much more difficult for her to develop and achieve as a student-athlete. *See Gabrielle M. v. Park Forest-Chicago Heights, Il. Sch. Dist.* 163, 315 F.3d 817, 828 (7th Cir. 2003) (Rovner, J., concurring in part and **[*706]** concurring in the judgment); *cf. Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (Ginsburg, J., concurring) ("'[T]he plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the

plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" (alteration in original) (citation omitted) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988))).

A.

While I believe that a plaintiff's grades are relevant to the question of the concrete and negative effect of harassment, an increase or decrease in grades is not dispositive. *See, e.g., Gabrielle M.*, 315 F.3d at 828 (Rovner, J., concurring in part **[*707]** and concurring in the judgment) (noting, in case concerning elementary school student, the fact "that [the plaintiff's] grades did not suffer is by no means dispositive"); *Montgomery v. Ind. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1094 (D. Minn. 2000) ("[G]rades are not the sole benefit to be derived by a student from an educational experience."). In this case, Jennings's grade point average increased from 1.538 at the end of her first semester in the Fall of 1996 to a cumulative average of 2.022 at the end of her sophomore year, when she was dismissed from the soccer team. J.A. 1449. I disagree with the dissent's conclusion that an improvement in grades is evidence of the lack of discriminatory impact. *See post* at 52. Discriminatory impact would be shown if Jennings's grades, though improved, had risen less than they would have had she not been subjected to a hostile environment. In this case, I believe that Jennings has proffered sufficient evidence to allow a jury to conclude that the hostile environment created by Dorrance affected her academic performance to such an extent that she was deprived of equal access to the benefits of an education at UNC.

***Jennings*, 482 F.3d 686 (4th Cir. 2007), CONT'D . . .**

During her deposition, Jennings testified that her grade point average was low during her time on the team because she was unhappy and uncomfortable due to the hostile environment created by Dorrance. J.A. 1320. Jennings specifically stated that she "found it hard to focus by just the constant--by the environment that was created--it was very hard to focus." J.A. 1321. When pressed, Jennings stated that it was the hostile environment created by Dorrance that affected her academic performance, rather than her teammates, her shortcomings as a soccer player, or her coaches' criticism of her soccer ability. *See* J.A. 1322-23 ("Q. Was the fact that other girls on the team were critical of your performance as a soccer player part of what was affecting your performance at school? A. No. Like I said before, it was the drinking comments, the comments made about all the girls, and their sexual stuff that just made me uncomfortable."). As noted by the majority, this testimony is supported by a psychiatrist's opinion that stress caused by the hostile environment contributed to Jennings's poor academic performance. J.A. 1583. Despite the subsequent increase in Jennings's grade point average, a rational jury could find, on the basis of her testimony and her expert witness, that her poor academic performance was a result of her lack of focus due to the hostile environment created by Dorrance or that her grades would have increased even more but for the hostile environment. *See Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 748 (2d Cir. 2003) (noting that despite student's steady academic performance during the period of harassment, her testimony that she was unable to sleep and did not want to attend classes and thus could not concentrate on her studies due to harassment was enough evidence to render the issue one for the jury); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 227-28 (D. Conn. 2006)(finding daily verbal and some

physical harassment undermined educational experience despite plaintiff's ability to maintain her good grades).

B.

The dissent implies that Dorrance's harassment could not have interfered with or denied Jennings the full educational opportunity of playing on the UNC women's soccer team because she attempted to improve her play and was dismayed at being cut from the team. *See Post* at 52. In essence, the dissent concludes that because Jennings did her best to avoid Dorrance and his abuse, but still made the most of her time on the team and as a student at UNC, she has forfeited her cause of action. This implication turns Title IX on its head. *Cf. Gabrielle M.*, 315 F.3d at 829 (Rovner, J., concurring in part and concurring in the judgment) ("Neither [the plaintiff] nor future victims of schoolplace harassment should be penalized simply because they seem resilient."); *Hayut*, 352 F.3d at 749 ("[W]hat students put up with, without objection or protest, does not mark the bounds of permissible classroom conduct."); *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) ("[A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.").

The evidence reflects that Jennings's attempts to make the most of her team experience did not involve increasing her interaction with Dorrance, but rather with her teammates. For example, in the Spring of 1998, prior to being cut from the team, Jennings hosted a team party at her home and participated in hazing events. J.A. 1365-66. Jennings described her relationship with Dorrance during that time

period as not "friendly" or "cozy": "It was just he was a coach and I was a player, and I did my thing. It wasn't that 'Hey, how are you doing,' . . . . I would get a nod; that is about it." J.A. 1374. Indeed, Jennings characterized herself as "continuing to pull away from" Dorrance during that time period. J.A. 1374. Thus, while Jennings was attempting to improve her play, her interactions with Dorrance grew more limited and her increased participation in the team took the form of increased socializing with her teammates.

A rational jury could view Jennings as having been denied the full opportunity to achieve her potential as a member of the UNC women's soccer team, despite her "growing desire to remain with the team." *Post* at 52. For example, a jury could view Dorrance to have, in effect, conditioned the receipt of his coaching and advice on acceptance of his sexual banter, a practice which denied Jennings equal access to the benefits of team membership. *Cf. Wills* 184 F.3d at 30 (noting that it is an open question whether the denial of informal tutoring from a professor is an educational benefit that could form the basis of a Title IX suit).

The dissent ignores the special context of Title IX. Unlike an employee-plaintiff in a Title VII action, if Jennings wished to remain a student at UNC and a member of a varsity soccer team, she had to remain a member of Dorrance's soccer team. Jennings was, of course, free to transfer, and had she done so as a result of Dorrance's harassment, she would have been even further deprived of the educational opportunities of UNC. *See, e.g., Hayut,* 352 F.3d at 750 (viewing student's withdrawal from a university because of sexual harassment as depriving the student of educational opportunities of university). In sum, a rational jury could find that Jennings, who had played

competitive soccer since the age of six, including stints on boys teams, was deprived of the educational advantage of UNC's soccer program, despite her attempts to improve and her disappointment when she was cut from the team, because of Dorrance's harassment.

IV.

This is a difficult case, but I ultimately believe that Jennings has presented enough evidence for her Title IX claims to move forward. Drawing inferences in Jennings's favor, a jury could conclude that the pervasive, hostile environment, resulting from Dorrance's conduct, amounted to sexual harassment and effectively deprived her of the educational benefits of being a student-athlete at the University. For the reasons stated above, the district court's grant of summary judgment should be reversed. Accordingly, I concur in the majority's opinion.

Judge Motz has requested that she is shown as joining this opinion.

DISSENT

[*708] NIEMEYER, Circuit Judge, dissenting:

This case raises the question of whether Melissa Jennings, a member of the University of North Carolina ("UNC") women's soccer team for the 1996 and 1997 seasons was, by reason of sexual discrimination, "deprive[d] . . . of access to the educational opportunities or benefits provided by the school," in violation of Title IX, 20 U.S.C. § 1681(a). *Davis v. Monroe*

Co. Bd. of Educ., 526 U.S. 629, 650, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999).

After being warned repeatedly about both her academic and athletic performance, Jennings was cut from the soccer team in May 1998, before the beginning of the 1998 season. By her own account, Jennings did not want to leave the team, and she was not expecting to get cut but rather expected to hear that she had improved. At the time, Jennings' cumulative grade point average was 1.964 on a 4.0 scale, up from the previous year's 1.538. But she was still at or near the bottom of the team's training performance levels and was a third-or fourth-string goalkeeper. She had played in only one regular season game during her first year and in one or two during her second year.

Only after Jennings was cut did her father write a letter to the general counsel of UNC, complaining about sexual harassment of his daughter during the previous two years. A few months later, Jennings commenced this action. The district court granted UNC's motion for summary judgment, and I would affirm.

During the two-year period of which Jennings complains, she alleged no deprivation of an educational opportunity by reason of sexual discrimination. She does allege (1) much sexual talk during practices by teammates and her coach, Anson Dorrance; (2) two innocuous comments directed at her by teammates and Coach Dorrance; and (3) a conversation during her annual evaluation meeting during which Coach Dorrance was trying to understand the reasons for Jennings' poor academic performance. He asked, "What is going on in [your] social life? Is that affecting [your] grades? Is that

affecting [you] as a player? Who are you f**king? Is that affecting your grades?"

Jennings does not allege that she was cut from the soccer team because of sexual discrimination or that she played any less because of sexual discrimination. She also does not allege any touching, advances, or offers of sex. Her claim amounts to a complaint about the vulgarity of the pervasive locker room-style talk by teammates and her coach that attended team practices. In these circumstances, the district court was correct in concluding that the facts do not create a triable issue as to a violation of Title IX, and therefore, I respectfully dissent.

I.

To give Jennings the full benefit of the facts in the summary judgment record, it is necessary to set them forth carefully and in some detail. This is especially important because Jennings (as well as the majority) has tended to rely on completely irrelevant incidents that occurred even before she entered UNC as a freshman; that she never knew about; and that she learned only from the testimony given in this case. [1]

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[1] For instance, the majority repeatedly relies on Dorrance's "fly on the wall" comment without mentioning that Dorrance allegedly made this comment to Debbie Keller, the team captain, in the spring of 1994 -- *more than two years before* Jennings enrolled at UNC. (J.A. 1068.) The majority also relies on numerous instances about which Jennings never had any knowledge -- nothing in the record imputes them to Jennings' knowledge, and Jennings herself never referred to them, even though she testified to every incident of which she had any awareness. (J.A. 1430-31.) Thus, the majority relies on the fact that Dorrance told a player "to keep your knees together . . . you can't

(continued...)

[*709] A.

Melissa Jennings began playing goalkeeper on soccer teams when she was 12 years old. She performed so well that within a few years she was the first-string goalie on an elite youth soccer club. (J.A. 1199, 1200.) After graduating from high school, Jennings went on a recruiting trip to the University of Kansas and verbally committed to play for its women's soccer team. (J.A. 1217.) Despite her verbal commitment to Kansas, Jennings wished to play soccer at UNC at Chapel Hill because she "knew it was the number one school. It ha[d] all the national titles." (J.A. 1216.)

The UNC women's soccer team, which Anson Dorrance has coached since its inception in 1979, has long been the dominant program in the sport, winning 19 of 26 national titles, including the national title in 2006. Because of the program's

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1 (...continued)
make it so easy for them" or asked another whether she was "going to have sex with the entire lacrosse team." (J.A. 1127.) But Jennings never heard those comments. Jennings also never testified knowing that Dorrance asked a player about the size of her boyfriend's genitalia. (J.A. 1452.) Similarly, the majority relies on the fact that Dorrance showed overt affection for Keller. But Jennings' only testimony in this regard is in relation to the weight room incident, which she described as follows: "[W]e are in the weight room, [Debbie Keller] goes off and talks with [Dorrance] in the bleachers." (J.A. 1290.) Finally, neither Jennings nor Keller ever testified that Dorrance "dangl[ed] his hand in front of [Keller's] chest," (J.A. 1452-53), as relied on by the majority.

dominance, Jennings called Dorrance and expressed her interest. (J.A. 1216.)

Dorrance was familiar with Jennings because of a UNC soccer camp that she had attended, and he asked her if she had already committed elsewhere. After finding out about her Kansas commitment, he told her to speak with Kansas' head coach to see if Jennings could visit Chapel Hill. (J.A. 1217-18, 1221.) Jennings did visit UNC and ultimately joined its soccer team as a walk-on recruit. Dorrance did not recommend her for a scholarship. (J.A. 181.)

During Jennings' freshman season, in the fall of 1996, she was the third-or fourth-string goalkeeper and played in one preseason game and one regular season game. (J.A. 1334.) The team held practice every weekday afternoon during the fall and on Saturday mornings, except on game days. (J.A. 1042-43.) During the first 10-15 minutes of practice, before the formal drills began, the players had what they called "team time," during which they would warm up, run a lap, and stretch as a group. (J.A. 1046-47.) Debbie Keller, the team captain in 1996, described these warm-ups as a time "at the beginning of practice to talk about our day and then get serious for practice," to "talk about . . . anything that would interfere with your concentrating on practice." (J.A. 1044-45.)

The environment during team time was casual and informal, and the women joked and conversed about a range of topics, invariably talking about their social activities and their personal lives, including their sex lives. They talked about the "parties they had been to," whom they were dating, and "who they hooked up with." (J.A. 1047-51.) Some girls discussed "intimate sexual details," (J.A. 1052), giving "in full detail,

start to finish," an account of "the night they spent with some guy," including the "different sexual [*710] acts they performed." (J.A. 1054.) According to Keller, these players openly shared "too much info." (J.A. 1055.) Others discussed the numerous sexual exploits they had undertaken within a short period of time. (J.A. 1055, 1058.) While most of the sex talk among the women during team time was more general than descriptive, like whether they "had sex" or whom they had "hooked up with," (J.A. 1041, 1056), Keller testified that "anywhere between five to ten times" per season, the women gave "graphic," "full detail," "start to finish" descriptions of their sexual experiences. (J.A. 1054-55.)

Not all of the women discussed their sex lives so openly and in such detail during team time. Keller described degrees of openness among the players, with some women being "very wide open about" their personal and sex lives, others being intermediately so, and still others keeping their personal lives completely private. (J.A. 1053-56.) Jennings fell into the last group, testifying in deposition that she did not participate in her teammates' sex-themed conversations. (J.A. 1242, 1244.)

Once or twice a week, Coach Dorrance mingled with his players during team time, walking among them as they stretched and warmed up. (J.A. 1061.) The players' team-time conversations were free-flowing, and Dorrance did not regulate their content. To the contrary, Dorrance regularly stopped and participated in these informal conversations, "joking around with different girls about their evenings before or just who they're dating." (J.A. 1057.) At times, Dorrance asked whether the players had been out drinking, and if so, how much. (J.A. 1067.) He also asked about team members' families. (J.A. 1067.)

Because some of the women openly discussed their sex lives, Dorrance overheard some of their more frank discussions as he walked among them. According to Keller, "occasionally" and certainly not "every time that he walked through," Dorrance would pause and engage in these discussions, commenting on his players' "personal dating [and] sex lives." (J.A. 1066.) Keller testified that Dorrance did not confine his comments and inquiries to team time, but talked to his players at other times when "the team was together," whether "after a game" or when waiting "for rides." (J.A. 1128.) Amy Steelman, who played with Jennings during the 1996 season, remembers the frequency of Dorrance's interventions differently, averring that "[w]hen Anson Dorrance was around, he would encourage and participate in sexual discussions, sexual jokes, sexual talk, sexual banter, and sexual innuendos. A typical Monday afternoon included queries and discussions with Dorrance into the team members' sexual and social exploits, particularly prying into our sex lives." (J.A. 1452.) Jennings commented that "Dorrance's sexual comments and inquiries took place on a regular basis."[2] (J.A. 1585.)

Jennings testified that she never participated in any of the sexual banter engaged in mutually by her teammates and

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[2] Dorrance has a much different recollection of the facts. In his affidavit, he stated: "I never initiated comments on those topics, only infrequently heard players' comments on those subjects and even less frequently said anything to any player at those times about those subjects." (J.A. 186.) Several former soccer players who were Jennings' teammates at UNC submitted affidavits consistent with Dorrance's version of the facts. (J.A. 320, 324, 330, 332). At this summary judgment stage, of course, these allegations must be ignored, and the truth of the testimony of Jennings, Keller, and Steelman must be accepted.

Dorrance. (J.A. 1242-43.) Jennings also testified that Dorrance never directed any of his "team-time" comments at her. (J.A. 1242-43.) Although she did not participate **[*711]** and although she was not targeted, Jennings paid attention to the banter, and she labeled much of what she overheard as inappropriate and humiliating. She testified to only two specific incidents about which she heard, however, to provide content to her general descriptions. First, one player informed the team, in Dorrance's presence, that over the course of an evening, she had sex with a man, crawled out of his window, crawled into another man's window, and had sex with him too. (J.A. 1055, 1058.) Dorrance asked the player whether she knew the names of these men, and whether "she took tickets." (J.A. 1236.) Dorrance also asked this player, who was very open about her promiscuity, who her "f**k of the minute," "f**k of the hour," and "f**k of the week" was, and how "many guys on the [lacrosse] team did she f**k?" [3] (J.A. 1237-38.) Second, another player spoke of a previous weekend with her boyfriend, and Dorrance asked her if she was "going to have a shag fest . . . when he comes to town," and whether she was "going to f**k him and leave him?" (J.A. 1284.)

Beyond these two incidents, Jennings testified about one other particular comment that Dorrance made at practice, although it was neither directed at her nor made in the presence of any player. During a water break, Dorrance was talking to a male athletic trainer, and Jennings overheard them both use the phrase, "Asian threesome." (J.A. 1285.) Jennings heard Dorrance "kind of chuckle" and say, "Oh, yeah," after hearing

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[3] Keller testified that Dorrance "would use words more like 'promiscuous,'" asking "how many people are you going to sleep with." (J.A. 1127.)

the phrase. (J.A. 1285.) Jennings interpreted the phrase to be a description of a fantasy involving two of her Asian teammates and one of the men. (J.A. 1284-86.) Jennings also complained of Dorrance's use of profanity, including the words and phrases "f**k," "unf**kingbelievable," "what the f**k," "f**king brilliant," and "f**king stupid." (J.A. 1231-33, 1264-65.) Jennings testified that Dorrance would use such phrases when his players made mistakes, such as when he believed a player made a poor pass. (J.A. 1231.)

Jennings testified that Dorrance would occasionally comment on players' physical attributes, complimenting one player for having "nice legs," (J.A. 1233), and another for having "cute dimples," (J.A. 1229), commenting on "asses in spandex," (J.A. 1229), scorning one as a "fat ass," (J.A. 1228), and referring to one woman's chest as her "rack." (J.A. 1236.) Jennings testified, however, that Dorrance never commented on any of her physical attributes, respectfully or disrespectfully. (J.A. 1243.) Jennings also admitted that Dorrance never threatened her, never touched her, never ogled her, never propositioned her, and never made any form of sexual advance.

In fact, from her two years on the team, Jennings could testify of only two instances when her personal life was mentioned at all during soccer practice while Dorrance was present. The first occurred before practice when Jennings and some teammates were sitting on bleachers lining the soccer practice field with Dorrance nearby. (J.A. 1252-54.) One of the players spoke about her weekend with her boyfriend, and Dorrance asked if it had been a "shag fest." (J.A. 1249.) The teammate, seeking to involve Jennings in the conversation and knowing that Jennings, whose nickname was "Trim'n" (which,

Jennings stated, had no sexual connotation), had visited her boyfriend at a different school the previous weekend, asked, "What about Trim'n?" (J.A. 1246-48, 1252.) Dorrance "chimed in," saying, "yes, what about Trim'n?" (J.A. 1246, 1252.) Jennings ignored **[*712]** the questions asked by her teammate and Dorrance, and left for the practice field to do "goalkeeper stuff." (J.A. 1255.) The second instance occurred during team time when a teammate asked Jennings whether a boy she had seen Jennings hug after the previous day's game was a boyfriend or just a friend. (J.A. 1257-59.) Jennings responded that the boy was just a friend. (J.A. 1258.) As for Dorrance's involvement in the exchange, he was present, but Jennings could not remember whether he said anything. (J.A. 1258.)

As the season progressed, Jennings became concerned about the sexual banter and other issues, and she approached Susan Ehringhaus, then Assistant to the Chancellor and Senior University Counsel, sometime between September and November 1996 to express her concerns. (J.A. 1337-39, 1341.) Jennings trusted Ehringhaus because she was a woman; she was UNC's top legal officer; and Jennings generally felt comfortable with her. (J.A. 1338.) Jennings told Ehringhaus (1) that Dorrance contributed to a "humiliating" and "uncomfortable" environment, giving Ehringhaus "a run-down of what I thought would encompass everything" regarding Dorrance's inappropriate comments, including the specifics of Dorrance asking a team member "who the f**k of the week is." (J.A. 1342-43); (2) that Dorrance failed to visit her in the hospital when she had become sick earlier that semester (J.A. 1335) and failed to mention to the team that her hospital stay was the reason she had missed a game (J.A. 1340); (3) that Dorrance requested that Jennings buy $ 400 worth of Gatorade for the team and the team's opponent during the water supply

disruptions caused by Hurricane Fran and subsequently failed to reimburse her (J.A. 197, 1344-45); and (4) that Dorrance encouraged Jennings to attend parties with her teammates, even though Jennings had told Dorrance that she was underage and alcohol was present at the parties (J.A. 198, 1338-40, 1347-48). Jennings did not relate that any of Dorrance's sexual comments had been directed at her. (J.A. 1346-47.) Ehringhaus stated that Jennings made no complaints about the sexual banter at this meeting or any other meeting until after Jennings had been cut from the team. (J.A. 198.) But according to Jennings, Ehringhaus responded to Jennings' complaints by encouraging her to "work it out with" Dorrance and asking whether she was "taking those comments into context." (J.A. 1342.) Ehringhaus characterized Dorrance as "a great guy" and related that she had "known him for a long time." (J.A. 1342.) To Jennings, Ehringhaus "didn't seem that concerned." (J.A. 1342.)

A short time later, again during the fall of 1996, Jennings approached Ehringhaus for a second time. At this meeting, Jennings focused solely on Dorrance's failure to reimburse her $ 400 for buying the Gatorade. (J.A. 1346.) Jennings did not mention anything about the sexual banter at practice. (J.A. 1345-46.) Following this meeting, Jennings' father, Craig Jennings, also wrote a letter to the University, complaining of Dorrance's failure to reimburse his daughter the $ 400. (J.A. 1352-53, 1411, 1543.) His letter did not mention any sexual comments at practice. (J.A. 1543, 1551.) The reimbursement issue was thereafter resolved, and Jennings had no further meetings with Ehringhaus until after she had been cut from the team. (J.A. 1350-51.)

Dorrance had a custom of meeting with each of his players individually at the end of the soccer season for a personal

assessment of their performance during the season in the areas of conditioning, skills, and on-field performance; contributions to team chemistry; and academic status. (J.A. 182-83.) For the 1996 season, Dorrance [*713] held these end-of-year meetings in his hotel room while the team was in California during December to play in the national championship tournament. (J.A. 1305.) After the player before Jennings had finished her personal progress meeting with Dorrance, Jennings went in, and both she and Dorrance sat down at a table located by the window in his hotel room. (J.A. 1308.)

Dorrance began the conversation with "small talk," asking Jennings such questions as "[H]ow are you doing?" and "[W]hat is going on?" (J.A. 1309.) Dorrance began the substantive portion of the meeting by addressing Jennings' grade point average, which was a 1.538 on a 4.0 scale. (J.A. 1449.) Jennings knew that she was in danger of losing her athletic eligibility due to her poor grades. Dorrance told her that her grades "needed to improve" and that they were "not acceptable." (J.A. 1315, 1316.) He explained how important her grades were, telling her she "ha[d] to study" and "do better in school." (J.A. 1316.)

Seeking to find the reasons for Jennings' poor academic performance, Dorrance asked Jennings if she needed help, inquiring whether she had been visiting the team's academic tutor (which she had been). (J.A. 1318.) According to Jennings, Dorrance then inquired whether Jennings' social life was affecting her grades, asking, "What is going on in [your] social life? Is that affecting [your] grades, is that affecting [you] as a player?" (J.A. 1329-30.) "Who are you f**king?" "Is that affecting your grades?" "[Is that] causing a problem with your grades, with your performance?" (J.A. 1326, 1330.)

Jennings was taken aback by the question, and immediately replied that her personal social life was "[n]one of his god damn business." (J.A. 1325, 1331.) Dorrance ceased his inquiry into the possible causes of Jennings' poor academic performance and "started talking about [Jennings'] performance as a player." (J.A. 1327.)

Because Jennings had played in only one game during the year, as well as one preseason game, (J.A. 1334), Dorrance focused his comments on Jennings' conditioning, telling her that her statistics for weightlifting, sprinting, and the like were below team standards and therefore needed to improve. (J.A. 1327.) Dorrance ended the meeting by telling Jennings to "[i]mprove [her] grades, first and foremost, and then . . . improve [her] performance, . . . [and to] fight for that first string, second string position." (J.A. 1333.)

Jennings returned to the soccer team as a sophomore for the fall 1997 season, during which she again had minimal playing time, appearing in one or two games. (J.A. 1356.) Again at the end of the 1997 season in December, Dorrance met individually with each player for a personal progress assessment. At Jennings' meeting, Dorrance discussed her academics, fitness, and contributions to team chemistry. (J.A. 1361.) He commented that Jennings' cumulative GPA had improved to a 1.964 from the previous year's 1.538. (J.A. 1449.) In Jennings' words, Dorrance tried "to push me to continue in a positive manner with my grades. He was acknowledging the fact that I had made the effort." (J.A. 1362.) But he told Jennings that she was still falling short of the team's academic standards. (J.A. 1361.) He also told Jennings that she needed to focus on her fitness and training, commenting that she was not meeting the team's standards in

those areas either. (J.A. 1362.) Finally, he encouraged Jennings "to be a positive life source" for the team by cheering for the players from the sidelines, being "a comforting figure, and [a] positive person, being supportive of teammates, and everything else." (J.A. 1362, 1363.) Dorrance **[*714]** told Jennings that he would have to remove her from the team if she did not improve in each areA. (J.A. 1363.) Nothing else was discussed. (J.A. 1365.)

During spring 1998 (the off-season), Jennings made efforts to be more involved in the team's social activities, including hosting recruits, working at the team's concession stand, and even hazing the team's new members. (J.A. 1365-1372.)

On May 5, 1998, after Dorrance had asked each player to complete a self-evaluation and an evaluation of her teammates (J.A. 1391), Dorrance again conducted one-on-one meetings with his players. At Jennings' meeting, Dorrance told her that her training and fitness levels were still below the team's minimum standards (J.A. 1387), that her performance was sub-par (J.A. 1395), and that she therefore "was no longer to be a part of the team." (J.A. 1387.) Jennings was shocked and became "hysterically upset." (J.A. 1392.) Jennings "was not expecting to get cut. I was expecting him to say, 'You know, you've improved.' . . . I thought I had done well. I even did my [skills] testing injured. [I] was, you know, making every possible attempt to do what he had asked." (J.A. 1388.) Dorrance described Jennings' efforts differently, observing that she "has no discipline to improve herself as a player, is a poor student and is bad for chemistry." (J.A. 279.) "Jennings was clearly the worst goalkeeper on the team during the years she played." (J.A. 182.)

A week after Jennings had been cut from the team, her father, Craig Jennings, wrote a letter to Ehringhaus, dated May 12, 1998. (J.A. 1551.) Although Craig Jennings had once before -- in the fall of 1996 -- written to Ehringhaus to complain about the delayed reimbursement for Jennings' purchase of Gatorade and the presence of alcohol at parties attended by team players, he now complained for the first time about the personal and sexual nature of Dorrance's comments and questions during practice and during the player interviews. Craig Jennings specifically complained:

> Coach Dorrance has in every player/coach review (except the one last week) and at the practice field asked the following questions:
>
> 1. Who is your boy friend? Are you seeing anyone? What does he do? Are you enjoying the UNC campus? We personally do not find these questions totally offensive, but the answers are Melissa's to give, if she chooses without retribution.
>
> 2. When answering yes to a boy friend or after bringing friends to team activities he then has asked the following: Are you sleeping with him? Are you shacking up with him? We find both of these questions totally inappropriate and harassing!
>
> 3. The Monday practice session team question has been on numerous occasions: Who is shacking up with whom? He will even question roommates on the field about the exploits of their teammates?
>
> 4. To one team member (not Melissa), he asks the team who her S for the week is/was? Like most

> of the team members she can not respond because he totally owns her way through your fine institution and controls her ability to go to your school. This is the sickest form of harassment.

(J.A. 1551.)

Ehringhaus forwarded Craig Jennings' May 12 letter to UNC Athletic Director Richard Baddour, who then ordered Beth Miller, the Senior Associate Athletic Director, to begin an investigation pursuant to UNC's sexual harassment policy. (J.A. 200, 264.) Miller arranged a meeting on May 26, 1998, at which Jennings, Craig Jennings, Ehringhaus, Baddour, Dorrance, **[*715]** and Miller herself attended. (J.A. 1529.) At the meeting, Jennings discussed the manner in which Dorrance had dismissed her from the team (J.A. 1401), recounted when Dorrance asked her about her sex life in their one-on-one evaluation meeting in December 1996 (J.A. 1404), and described the content of the sexual banter between Dorrance and his players. (J.A. 1406.) Dorrance responded with a firm denial of ever discussing sexual activity in a one-on-one meeting with any player, but he acknowledged that he participated in group discussions during practice that touched on his players' sex lives. He maintained that his comments were only "of a jesting or teasing nature." (J.A. 1531.)

Following the meeting, Athletic Director Baddour wrote Craig Jennings a letter dated June 9, 1998, in which he stated:

> Any unwelcome discussions, including jesting, regarding sexual activity and team members' relationships with men are inappropriate in the context you described. While Coach Dorrance

> strongly denies that he has ever discussed an individual team member's sexual activity in a one-on-one discussion, Coach Dorrance has acknowledged that he participated in group discussions of a jesting or teasing nature with soccer team members. This is altogether inappropriate. While his actions were not intended to be offensive, he now realizes that his involvement in such discussions is inappropriate, and he will immediately discontinue that activity. Appropriate interventions have also occurred with Coach Dorrance to address these unacceptable conversations.
>
> The University and Coach Dorrance apologize for the "money issue." He has maintained that he did not intend to embarrass Melissa in any way. He recognizes that he offended her and used poor judgment and for that he apologizes.
>
> Coach Dorrance also realizes that his dismissal of Melissa was ill-timed, and he apologizes for the untimely discussion during the exam period.

(J.A. 1531.) Dorrance also signed the letter. (J.A. 1531.)

Athletic Director Baddour completed his investigation of Jennings' complaints by reprimanding Dorrance in a letter dated June 10, 1998, which stated:

> As I indicated to you in our last meeting I am writing to officially notify you that it is inappropriate for you to have conversations with members of your team (individually or in any size

> group) regarding their sexual activity. Please refer to my letter of June 9, 1998 to Craig Jennings.

(J.A. 1533.)

B.

On August 25, 1998, at the beginning of Jennings' third year at UNC and a few months after she was cut from the team, Jennings sued UNC and several individual defendants, including Dorrance, alleging (1) a Title IX claim against UNC, (2) claims under 42 U.S.C. § 1983 against Dorrance for sexual harassment and invasion of privacy and against various UNC officials for failure to supervise Dorrance, and (3) a common law claim against Dorrance for invasion of privacy. The district court granted the defendants' motions for summary judgment, and a divided panel of this court affirmed. *Jennings v. Univ. of N.C.*, 444 F.3d 255 (4th Cir. 2006). A majority of this court's active members voted to grant Jennings' motion to rehear this case en banc.

II.

Relying indiscriminately on the catalogue of statements made by Coach Dorrance and various members of UNC's soccer **[*716]** team, made both before and after Jennings attended UNC, the majority concludes that they created a severe and pervasive sexually hostile environment that denied Jennings access to the opportunities and benefits of the soccer program. The majority's approach lacks any precision about the meaning of comments, their connection with Jennings, their timing (some occurred before Jennings came to UNC), and

their effect on Jennings and the soccer program. A disciplined analysis of the facts and their effect on Jennings can lead only to the conclusion that the sexual banter, while extensive and inappropriate, did not deny Jennings any educational opportunity. Indeed, she has never claimed that it did. The majority's analysis amounts in essence to an evaluation of the vulgar language by Coach Dorrance and teammates rather than an analysis of whether such violations of civility amount to a cause of action under Title IX.

While I agree that the sexual banter during soccer practices was vulgar and inappropriate, both as to Coach Dorrance and the soccer team members, the banter had no effect on whether Jennings played soccer, or indeed whether she wanted to play soccer, at UNC. To the contrary, despite the banter, Jennings deeply desired to be a member of the team. When she was cut for reasons unrelated to sexual banter, she was shocked and profoundly disappointed.

At bottom, Jennings made genuine complaints about vulgar sexual banter, but there were no complaints that the sexual banter denied her educational benefits. Therefore Jennings did not make out a Title IX claim.

Before conducting the analysis demanded by Title IX, a review of the statute's requirements is necessary. This is particularly so because the majority has misdescribed the requirements of a Title IX claim, omitting the core requirement that the plaintiff demonstrate that she was denied the benefits of an educational program or activity on the basis of sex. *See ante* at 9.

***Jennings*, 482 F.3d 686 (4th Cir. 2007), CONT'D . . .**

Title IX prohibits an educational institution that receives federal funds from engaging in sex-based discrimination. The statute provides, with certain exceptions not at issue here, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). While Title IX does not, by its terms, create a private cause of action against the funding recipient, the Supreme Court has implied one, *see Cannon v. Univ. of Chicago,* 441 U.S. 677, 717, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), and it has held that money damages are available in such suits, *Franklin v. Gwinnett County Pub. Schools,* 503 U.S. 60, 76, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992). The damages remedy will lie against the funding recipient, however, only when "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [funding] recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with "deliberate indifference to the discrimination." *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).

As with Title VII, "sexual harassment" under Title IX is a form of "discrimination." *See Franklin,* 503 U.S. at 74-75. In the context of student-on-student harassment, the Court has held that the harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits **[*717]** provided by the school." *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 650, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). But other than for student-on-student harassment, the Court has not defined the substantive contours of the

harassment forbidden by Title IX. Nonetheless, courts of appeals have looked to the Supreme Court's Title VII jurisprudence when interpreting Title IX. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65-66 (1st Cir. 2002); *Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654, 656-57 (8th Cir. 1997).

Because the Supreme Court implied in *Davis* that the "severe, pervasive, and objectively offensive" standard for student-on-student harassment was more demanding than Title VII's "severe or pervasive" standard for harassment generally, I agree with the majority that the level of harassment required for actionable claims under Title IX in the case of teacher-on-student harassment is Title VII's "severe or pervasive" standard. *See Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). This standard, of course, must be applied with sufficient discipline that the standard does not become a "general civility code." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

Much more significant to Title IX liability, however, is the analysis required for determining when a given level of harassment brings about *consequences* with which Title IX is concerned. To succeed in a Title IX harassment claim, the plaintiff must prove that the harassment was so severe or pervasive "that it can be said to deprive the [plaintiff] of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. This requirement of specified consequences derives from the text of Title IX itself, which shields students from "discrimination," such as being "excluded from participation in" or "denied the benefits of" any

"education program or activity receiving Federal financial assistance" on the basis of sex. 20 U.S.C. § 1681(a). Therefore, harassment standing alone, no matter how severe or pervasive, is not actionable; it must have the *effect* of discriminating so that it effectively denies students of "equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651; see also 20 U.S.C. § 1681(a). Title IX's purpose is not to eradicate harassment from the educational environment; it is "a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner." *Gebser*, 524 U.S. at 292.

Thus, Jennings must show that she was subjected to harassment -- because of her sex -- so objectively severe or pervasive that she was effectively denied equal access to UNC's resources and opportunities.

III.

In this case, Jennings' evidence, while amply describing instances of sexual banter among teammates and Coach Dorrance, falls far short of demonstrating that Jennings was denied the benefits of soccer team membership. She has never alleged that she did not want to be a member of the team or that the banter denied her the benefits of membership. Indeed, she wanted to remain on the team and believed that her improvements in performance justified remaining on the team. She was shocked and angered when she was cut.

Moreover, Jennings complained only once to UNC officials during her two years on the team about the banter and then at such a low level that the person to whom **[*718]** she

complained did not recall it. In addition, when Jennings' father wrote on Jennings' behalf about problems that Jennings had encountered with the soccer program -- a lack of reimbursement and invitations to parties at which alcohol was served -- he did not mention any sexual banter or harassment. Only after Jennings was cut from the team were accusations of sexual harassment made.

Jennings has tried to argue that she was denied an educational benefit by asserting conclusorily and without factual support that Dorrance's conduct "negatively impacted [her] academic performance and performance on the soccer field." (J.A. 1585.) Yet, the record shows that when, over the course of two years, she was confronted with her poor academic and field performance, her response never suggested a problem with Dorrance's conduct. Rather, the discussions focused on more disciplined training and more time for academics. Moreover, the record shows that Jennings did improve academically each semester. (J.A. 1449.) More revealing is Jennings' own evaluation of herself that she was doing better. As she testified, when she was cut, she was expecting Dorrance to say to her, "You know, you've improved." (J.A. 1388.)

It is not surprising therefore that Jennings' argument on appeal focuses entirely on whether Dorrance's conduct was severe or pervasive, rather than on whether she was denied an educational benefit. The majority simply continues this emphasis by ignoring or misstating the core requirement of Title IX liability that conduct deprive a plaintiff of "equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651; see also 20 U.S.C. § 1681(a). The majority completely and inexplicably omits this core requirement from

its boilerplate recitation of the necessary elements for "establish[ing] a Title IX claim on the basis of sexual harassment." *See ante* at 9.

When the majority does purport to address the omitted requirement, it holds that Jennings may satisfy the requirement by merely alleging that Dorrance's comments had a "negative impact" on her "performance on the soccer field." *See ante* at 17. This holding stands on a complete misreading of *Davis*. If the majority sincerely believes that the Supreme Court "point[ed] out that sexual harassment reaches the level of actionable discrimination when it has 'a concrete, negative effect on [the victim's] ability' to participate in a program or activity," *see ante* at 15 (quoting *Davis*, 526 U.S. at 654), it has blatantly ignored the entire portions of the opinion that actually define the cause of action. Contrary to the majority's representation of *Davis*, the Supreme Court reiterated *five* separate times that Title IX's discrimination requirement is satisfied "*only where* [the harassment is so severe or pervasive] that it can be said to *deprive the victims of access* to the educational opportunities or benefits provided by the school." *See Davis*, 526 U.S. at 654 (emphasis added); *Id. at 633* (same); Id. at 651 (same); Id. at 652 (same); Id. at 653 (same). It was only when the Court applied "*this standard* to the facts at issue" that it stated the following: "The harassment was not only verbal; it included numerous acts of objectively offensive touching, [including] criminal sexual misconduct. . . . Further, *petitioner contends* that the harassment had a concrete, negative effect on her daughter's ability to receive an education." Id. at 653-54. It is almost too obvious to state, but the petitioner's isolated contention in *Davis* did not define what it means to "discriminate" under Title IX, **[*719]** as the

majority apparently believes. [4] The Court accepted that allegation as part of a complaint that included allegations of "objectively offensive touching" of the plaintiff amounting to "criminal sexual misconduct." The majority's importation of and heavy reliance upon a watered-down "negative impact" test, derived from a single allegation in the *Davis* petitioner's complaint, is obviously wrong, particularly when the Court specifically and repeatedly articulated the Title IX cause of action.

The majority's gutting of the "denial of benefit" requirement is not only contrary to the Supreme Court's pronouncements in *Davis*, but more importantly, it contravenes the actual text of the statute, which only shields students from *"discrimination,"* such as being "*excluded* from participation in" or "*denied* the benefits of" any "education program or activity." *See* 20 U.S.C. § 1681(a) (emphasis added).

The acts of sexual harassment alleged by Jennings can be divided, for discussion purposes, into three categories: (1) "sexual" banter at practice *directed at or involving Jennings;* (2) other sexual banter at practice among teammates and Coach Dorrance; and (3) the December 1996 evaluation meeting between Jennings and Dorrance at which Dorrance inquired, as part of his effort to discover the cause of Jennings' poor grades, who Jennings was "f**king." I address these in turn.

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[4] Indeed, the majority even waters down the petitioner's allegation in *Davis*. In *Davis*, the petitioner contended that the harassment had a "concrete, negative effect on her daughter's ability *to receive an education.*" *Davis*, 526 U.S. at 654. The majority converts "receive an education" to "participate in a program or activity." *Ante* at 15.

A.

Jennings identified two incidents during her two years on the team when the banter at practices involved or implicated her.

The first incident arose prior to a practice when one of Jennings' teammates recounted her weekend's activities with her boyfriend, and Dorrance asked if it had been a "shag fest." (J.A. 1249.) The teammate, seeking to involve Jennings in the conversation and knowing that Jennings had visited her boyfriend at a different university the previous weekend, asked, "What about Trim'n?" (J.A. 1246-48, 1252.) Dorrance "chimed in," saying, "yes, what about Trim'n?" (J.A. 1246, 1252.) Jennings ignored these questions from her teammate and Dorrance and left for the practice field. (J.A. 1255.)

Dorrance's question was an offhand comment amounting to "simple teasing." It was Jennings' teammate who instigated the efforts to involve Jennings in the conversation, and Dorrance's question was merely a follow-up to hers. The only reason the question even achieves the status of "simple teasing," instead of being utterly innocuous, is because of Dorrance's earlier "shag fest" comment to Jennings' teammate. A "recurring point" in the Supreme Court's Title VII opinions, however, is that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher*, 524 U.S. at 788 (citation omitted). The Court's "standards for judging hostility are sufficiently demanding" to "filter out complaints attacking the ordinary tribulations" of collegiate athletics, "such as the sporadic use of abusive language, gender-related jokes, and occasional

teasing." *Id.* (citation and quotation marks omitted). This incident certainly falls within the "simple-teasing" category.

The second incident involved a teammate asking Jennings whether a boy she **[*720]** had seen Jennings hug was a boyfriend or just a friend. (J.A. 1257-59.) Jennings responded that the boy was just a friend. (J.A. 1258.) As for Dorrance's involvement, Jennings remembers him being present but saying nothing. (J.A. 1258.) Not even the majority relies on this incident, for reasons that are obvious -- it could neither stand alone as an incident of sexual harassment nor add to a collection of incidents constituting sexual harassment.

B

The sexual banter at practices among teammates and Coach Dorrance also does not rise to sexual harassment of Jennings. Jennings rightfully places herself as a bystander during this banter. When there is an absence of sexual harassment *directed at a plaintiff,* however, environmental conduct voluntarily engaged in by others has never supported a claim for sexual harassment.

In the two cases where we have most relied on background conduct in applying the "severe or pervasive" standard, the *direct* harassment of the plaintiff still provided the foundation for the hostile environment claim. In *Spriggs v. Diamond Auto Glass,* 242 F.3d 179 (4th Cir. 2001) (*Spriggs II*), we took into account environmental conduct as enhancing conduct specifically directed at the plaintiff. But the core of the harassment claim in *Spriggs* was based on a white supervisor repeatedly calling his African-American subordinate, "dumb monkey" and "nigger," during the relevant employment period.

See Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1017 n.2 (4th Cir. 1999) (*Spriggs I*). Similarly, in *Ocheltree v. Scollon Prods.*, 335 F.3d 325 (4th Cir. 2003) (en banc), we took environmental conduct into account, but primarily to enhance the core sexual harassment directed at the plaintiff, who was a female. The targeted harassment included male co-workers confronting the plaintiff with a pornographic picture depicting pierced male genitalia; simulating oral sex on a mannequin while fondling the mannequin's breasts in front of the plaintiff in order to rile and offend her; and singing to the plaintiff, in an operatic voice, "Come to me, oh, baby come to me, your breath smells like come to me." *Id.* at 328.

In cases where there was a scarcity of direct harassment, however, the plaintiffs could not rely on environmental conduct to make their claim. *See, e.g., Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753-54 (4th Cir. 1996) (upholding entry of summary judgment against complainant because of his overreliance on incidents "not directed specifically at him," such as those occurring in "group settings").

Moreover, the Supreme Court itself has assumed throughout its Title VII and Title IX cases that only harassment *directed* and *targeted* at the victim was capable of creating a hostile environment. In *Meritor*, for example, "sexual harassment" was defined as "unwelcome sexual *advances, requests* for sexual favors, and other verbal or physical conduct of a sexual nature." 477 U.S. at 65 (citation and quotation marks omitted) (emphasis added). In *Harris*, the Court stated that the workplace must be "permeated with discriminatory intimidation, ridicule, and insult." 510 U.S. at 21 (citation and quotation marks omitted). But the intimidation, ridicule, and

insults in *Harris*, as elsewhere, *targeted the victim. 510 U.S. at 19* (stating the victim was made "the target of unwanted sexual innuendos"). Thus, in *Davis*, the student was not only verbally assaulted, but was also touched in a manner that amounted to "criminal sexual misconduct." 526 U.S. at 653. In *Faragher*, the complainant faced "uninvited and offensive touching" and such choices as, "[d]ate me or clean the toilets for a **[*721]** year." 524 U.S. at 780. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 77, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998), the complainant "was forcibly subjected to sex-related, humiliating actions against him," such as being "physically assaulted . . . in a sexual manner" and being "threatened with rape." These examples fairly reflect the Court's consistent teaching that Title VII and Title IX protect victims, not witnesses, of harassment.

In short, the indirect sexual banter of which Jennings complains cannot on its own support Jennings' harassment claim. Nor does it heighten the discriminatory impact of the one instance of simple teasing directed at her so as to satisfy the demanding requirement that the harassment be so "severe or pervasive" that it "effectively bar[] the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633.

C.

The third and perhaps principal incident of which Jennings complains occurred during Jennings' end-of-year personal progress meeting in December 1996. It arose from Dorrance's inquiry into the causes for Jennings' poor academic performance during her first semester at UNC. Jennings' GPA at the time was 1.538 on a 4.0 scale. (J.A. 1449.) During the meeting, Dorrance impressed upon her the importance of her

studies, telling her that she "ha[d] to study" and "do better in school." (J.A. 1316.) He then sought to find the causes of Jennings' poor academic performance, as a responsible coach who risked losing a player due to academic ineligibility would do. Dorrance asked Jennings if she needed help, if she had been visiting the team's academic tutor (which she had been). (J.A. 1318.) He then wondered whether Jennings' social life was affecting her grades, asking, according to Jennings' testimony, "What is going on in [your] social life? Is that affecting [your] grades?" (J.A. 1329-30.) "Who are you f**king?" "[I]s that affecting your grades?" "[Is that] causing a problem with your grades, with your performance?" (J.A. 1326, 1330.) Jennings forcefully replied that her personal social life was "[n]one of his god damn business." (J.A. 1325-26, 1331.) Dorrance immediately dropped the subject, and according to Jennings, "started talking about my performance as a player." (J.A. 1327.)

As phrased, Dorrance's question "Who are you f**king" was plainly vulgar and certainly too personal. Nonetheless, the inquiry clearly did not focus on sex or include an overture to sex; it was, in context, obviously an inquiry about what was occupying Jennings' time. Jennings bordered on the verge of becoming academically ineligible to play soccer, and Dorrance, as her coach, intervened, asking if her grades were being adversely affected by her social life. Dorrance's question about Jennings' sex life was not physically threatening; it was not a sexual proposition; it was not made in an attempt to humiliate, degrade, and demean. *See Harris*, 510 U.S. at 23 (differentiating between the "physically threatening or humiliating" comment and the "mere offensive utterance"). Rather, the question was asked in an effort to discover the cause of Jennings' poor academic performance. Dorrance's use

of profanity and his inquiry into a personal subject for purposes of a legitimate inquiry about Jennings' time does not transform the single, isolated question into a "severe" example of sexual harassment. The context and purpose of the question, indeed, removed it from any consideration as sexual harassment of the kind prohibited by Title IX. *See Harris*, 510 U.S. at 21 ("'[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the **[*722]** conditions of employment to implicate Title VII" (quoting *Meritor*, *477 U.S. at 67*)).

* * *

Jennings cites no other incidents to support her claim, and she testified at the end of her deposition that this was all that she knew. (J.A. 1430-31.) She only became aware of other evidence -- evidence upon which the majority relies heavily -- after the commencement of this action. We are thus left with one simple incident of teasing, the team's sexual banter which Jennings overheard, and one coarsely posed question about what time-consuming distraction might be affecting Jennings' grades.

To evaluate such evidence for liability, courts must determine whether an environment is sufficiently hostile or abusive "by looking at all the circumstances," *Harris*, 510 U.S. at 23, including the context of the case, which in this case is the collegiate athletic field. *See Oncale*, 523 U.S. at 81 (explaining that a football player's environment "is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field -- even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office"). The collegiate

athletic field is unlike the typical classroom, and the collegiate athletic coach is unlike the typical university instructor. The proper baseline by which to judge the language of Coach Dorrance and Jennings' teammates is the world of competitive collegiate athletics in which coaches, by necessity, have a much more casual and personal relationship with their student-athletes. While vulgarity of the level witnessed by Jennings was surely not necessary to the program, it is undoubtedly normal for a coach to have discussions with a player about his or her body, athletic performance, academic performance, inter-player relationships, social activities, and extracurricular activities. College sports, especially an elite program like women's soccer at UNC, involve long and intensive daily practice sessions, extensive overnight travel, and a significant amount of downtime spent together.

Some coaches use profanity or sarcasm as a way to express displeasure, to emphasize a point, or to motivate. Dorrance, according to Jennings, cursed when his players made mistakes, such as when a player made a poor pass. (J.A. 1231.) But Title IX does not protect students from profanity. *See McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996) (holding that Title VII does not protect employees from discrimination "'because of' [the harasser's] vulgarity and insensitivity and meanness of spirit").

The critical inquiry in this case, as in all Title IX cases, is whether the alleged harassment was so objectively "severe [or] pervasive . . . that it can be said to deprive [Jennings] of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. The majority's application of a simple "negative impact" test -- whether Dorrance's comments had a "negative impact" on Jennings' "performance

on the soccer field," *ante* at 17 -- is simply inconsistent with the governing statute and with Supreme Court precedent, both of which require that the harassment actually "discriminate" by "depriv[ing] the [plaintiff] of access to . . . educational opportunities or benefits." *See* 20 U.S.C. § 1681(a); *Davis*, 526 U.S. at 650.

On this record, it cannot be said that Dorrance's language effectively excluded Jennings from participating as a member of UNC's women's soccer team, especially in light of Jennings' own testimony. And her empty assertion, made conclusorily in [*723] a litigation affidavit, that Dorrance's conduct "negatively impacted" her performance is completely undermined by her own testimony of the events. When Dorrance cut her from the team, Jennings testified that she was *shocked* and *hysterically upset* at being cut because she thought she had been *improving* as a player. She thought she had done well, doing everything she could to become a better player under Dorrance's direction. In Jennings' own words, "I was not expecting to get cut. I was expecting [Dorrance] to say, 'You know, you've improved,' this and this. I thought I had done well. . . . I was, you know, making every possible attempt to do what he had asked." (J.A. 1388.) This testimony hardly depicts a player who has been sexually harassed to the point of being denied the educational opportunity of playing on the team. The majority's effort to depict the environment on the soccer team as one that denied Jennings (or any other player, for that matter) the benefits of playing soccer is belied by this testimony.

Furthermore, Jennings' grade point average progressively improved during her two seasons on the team. Her cumulative GPA at the end of her freshman year was 1.539, at the end of

the 1997 summer sessions it was 1.903, at the end of the fall 1997 semester it was 1.964, and at the end of the 1998 spring semester, when she was cut from the team, it was 2.022. (J.A. 1449.) If a decline in grades is evidence of discriminatory impact, then an improvement in grades should be evidence otherwise. *Cf. Davis,* 526 U.S. at 652 (stating that even "a mere decline in grades" is insufficient to prove that the alleged harassment has deprived a student of access to school resources). A player, who not only does not leave a team or school, but also has a willingness or indeed a growing desire to remain with the team or school, must surely have to make an extraordinary showing to sustain a Title IX claim.

The majority fails to confront the legal consequences that flow from the undisputed fact that Jennings' evidence consists of (1) only *two* direct verbal comments made over the course of *two* years, and (2) second-hand comments that neither paint women in a negative or demeaning light, nor constitute anything approaching sexual advances, threats, coercion, or intimidation. In the face of her teammates' graphic, detailed, and open descriptions of their sexual exploits, Jennings complains of Dorrance going too far in his teasing. But however this environmental language is characterized, it falls woefully short of elevating the two verbal comments directed at Jennings to a level at which one could conclude that Jennings was denied the benefits of playing soccer for UNC. As Jennings' own testimony provides, it was her substandard conditioning, performance, and grades that did that.

IV.

Jennings' Title IX claim must fail for another, independent reason. Dorrance's comments were not gender-based, in that

they were not made because Jennings was a woman. Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). A person "is harassed or otherwise discriminated against ['on the basis of'] his or her sex if, 'but for' the employee's sex, he or she would not have been the victim of the discrimination." *Wrightson v. Pizza Hut*, 99 F.3d 138, 142 (4th Cir. 1996). "The critical issue" is "whether members of one sex are exposed to disadvantageous terms or conditions . . . to which members of the other sex are not exposed." *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

The direct harassment of which Jennings complains was in no way related to **[*724]** her gender. Dorrance asked, "What about Trim'n?", not because Jennings is a woman, but because he and a teammate wished to engage Jennings in a conversation about her dating life. Her gender was irrelevant to the question. Even more plainly, Dorrance did not ask Jennings about her sex life in December 1996 because of her gender, but because he was trying to discover the cause of Jennings' substandard academic performance. Jennings' gender played no role in Dorrance's question.

Furthermore, there is no evidence on the record from which to infer that "but for" Jennings' gender, Dorrance would have refrained from teasing Jennings about her dating life and from asking whether her sex life was affecting her grades. An integral attribute of Dorrance's coaching style was his willingness to engage his players on a personal and frank level. If Dorrance was then the coach of the men's soccer team, he would just as surely have teased his male players about their weekends with their girlfriends as he lightly teased Jennings about her weekend with her boyfriend. Such teasing about a player's social life is the norm on any collegiate athletic team,

whether male or female. Indeed, Jennings had the opportunity to present evidence that Dorrance treated women differently than men, as Dorrance simultaneously coached both the men's and women's soccer teams at UNC from 1979 to 1988. But the record remains silent about any such difference.

In addition, there is no evidence that Dorrance's inquiry about Jennings' social life was gender-based. Responsible coaches, whether of a men's or women's athletic team, search for the cause of a player's borderline academic ineligibility, including whether the player's social life is interfering. While Dorrance posed his question too crassly and personally, the question nonetheless was a grade-centered inquiry and not an inquiry made because Jennings was a woman. There is no evidence on the record that "but for" Jennings' gender, Dorrance would not have teased about her weekend or asked whether her sex life was affecting her grades.

As for the second-hand sexual banter, its relevance becomes yet more remote when considering whether Jennings was exposed to the banter because of her gender. There is no evidence that distinguished her environment from a male environment, where players would undoubtedly hear the same banter. She was exposed because she was a member of the team, not because she was a woman. At the beginning of oral argument, Jennings' counsel conceded that there would be no case if every fact were the same except that the team was full of male players "because [in that hypothetical] it would not be gender based." This concession is fatal because it necessarily relied on a further concession -- that the evidence, standing alone, could not show that Jennings was discriminated against because of her sex.

Moreover, it would be ridiculous to infer that Dorrance's comments were motivated by general hostility toward the presence of women on a women's soccer team, when he was the coach of the team. *See Oncale,* 523 U.S. at 80 (stating that when the harassing conduct is not motivated by sexual desire, an inference of gender-motivated harassment may still be derived if a victim "is harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women [or men] in the [educational setting]"). Indeed, Dorrance has been the head coach of the women's team for 27 years (since 1979), leading his players to 19 national championship titles. This duration and success rate makes any inference that Dorrance is generally hostile to **[*725]** young women soccer players even more preposterous.

"Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination* [on the basis of sex].'" *Oncale,* 523 U.S. at 81. The evidentiary route that Jennings has chosen, for the reasons given, does not prove discrimination "on the basis of sex." *See* 20 U.S.C. § 1681(a).

V.

Jennings seeks to hold Dorrance and Ehringhaus personally liable for sexual harassment under 42 U.S.C. § 1983, basing her claim on her *Fourteenth Amendment* equal protection right to be free from sexual harassment in educational settings. The *Equal Protection Clause*

> confers a right to be free from gender discrimination that is not substantially related to important governmental objectives. Applying this precept, courts have held that intentional sexual harassment of employees by persons acting under color of state law violates the *Fourteenth Amendment* and is actionable under § 1983. Courts may apply the standards developed in Title VII litigation to similar litigation under § 1983.

Beardsley v. Webb, 30 F.3d 524, 529 (4th Cir. 1994) (citations and quotation marks omitted).

Because Jennings has failed to demonstrate that Dorrance's language was so severe or pervasive as to deny her the opportunity to play soccer for UNC, it follows that her § 1983 claim must also fail.

VI.

Participation in intercollegiate athletics involves, of necessity, a level of physical and mental training that toughens a player in competition. It is not the same type of training that attends participation in a chamber orchestra or a debate team. Driving players to reach beyond their physical limits often involves yelling, encouragement, and condemnation. We can hardly apply the standards of the classroom or the courtroom to the language of the athletic field.

Of course, the environment cannot provide a cover for discrimination, including sexual harassment. In disposing of a case as this, we must discern the difference without imposing a civility code.

In the context of this case, Title IX presents the narrow issue of whether a player -- in this case Jennings -- was denied the benefits of the soccer team because of Coach Dorrance's comments. It is crystal clear that she did not think so until after she was cut from the team. From her anger and disappointment in being cut -- concededly not because of sexual discrimination -- she pursues this unfortunate law-suit to complain about vulgar language that surely did offend her, and rightfully so. But Title IX requires more.

For these reasons, I would affirm the judgment of the district court.

Judge Williams has authorized me to indicate that she joins in this opinion.

MELISSA JENNINGS, Plaintiff-Appellant, and DEBBIE KELLER, Plaintiff,

v.

UNIVERSITY OF NORTH CAROLINA, at Chapel Hill; ANSON DORRANCE, individually and as women's soccer coach at UNC; WILLIAM PALLADINO, individually and as assistant women's soccer coach at UNC; CHRIS DUCAR, individually and as assistant women's soccer coach at UNC; BILL PRENTICE, individually and as athletic trainer at UNC; MICHAEL K. HOOKER, individually and as Chancellor at UNC; SUSAN EHRINGHAUS, individually and as assistant to the Chancellor at UNC; RICHARD A. BADDOUR, individually and as Director of Athletics for UNC; BETH MILLER, individually and as Senior Associate Director of Athletics at UNC; JOHN SWOFFORD, individually and as former Director of Athletics for UNC; ALL DEFENDANTS, Defendants-Appellees.

No. 04-2447

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

444 F.3d 255

September 19, 2005, Argued
April 11, 2006, Decided

OPINION

[*259] DEVER, District Judge:

In this case we examine whether Anson Dorrance and William Palladino (the male coaches of the women's soccer team at the University of North Carolina at Chapel Hill) sexually harassed Melissa Jennings while Jennings was a student and soccer player at the University from August 1996 until May 1998. Jennings seeks to hold the University liable under Title IX, Dorrance, Palladino, and various University officials liable under 42 U.S.C. § 1983, and Dorrance liable understate law. The district court rejected Jennings' claims and granted the defendants' motion for summary judgment. On appeal, Jennings argues that she is entitled to have a jury determine all of her claims, including her claim that Dorrance created a sexually hostile environment.

Laws prohibiting sexual harassment are designed to protect people at work and at school from the kind of extreme conduct that can make work or school hellish because of the person's sex. The laws, however, are not designed to purge or punish all vulgarity at work or in universities. Whether conduct constitutes actionable sexual harassment cannot be divorced from the context in which the alleged harassment arose. Thus, a court evaluating a sexual harassment claim must examine the constellation of surrounding circumstances, expectations, and relationships.

When the evidence in this case is viewed most favorably to Jennings, the evidence shows that Dorrance used vulgar language and participated in sexual banter at practice with

some women that he coached and that he once directed a vulgar question at Jennings. Jennings immediately responded to Dorrance's vulgar question with her own profane reply and that ended the inquiry. Dorrance never touched, never threatened, never ogled, and never propositioned Jennings. Because no reasonable jury could find that Dorrance sexually harassed Jennings or find that Jennings' other claims have merit, we affirm the judgment of the district court.

I.

Anson Dorrance ("Dorrance") has served as head coach of the women's soccer team at the University of North Carolina at Chapel Hill ("University") since 1979. William Palladino ("Palladino") has served as the team's assistant coach since 1980. JA 336. Jennings ("Jennings" or "plaintiff") was a member of the women's soccer team and a student at the University from August 1996 until May 1998.

From August 1996 through May 1998, the women's soccer team consisted of approximately 26 members. *See* JA 930. Some of the women were on soccer scholarships and some were not. Jennings was a third-string or fourth-string goalkeeper. JA 182. She was recruited as a walk-on, and never was on scholarship. JA 181.

The regular season for women's college soccer is in the fall. During 1996 and 1997, except on game days, soccer practice for the University's team was every afternoon during the week and on Saturday morning. JA 1042-43. Before soccer [*260] practice formally began each day, the women on the team customarily warmed-up, ran a lap, and stretched

in small groups within a large circle for approximately ten to fifteen minutes. JA 1046-47. These warm-ups were casual and informal, and while stretching, the team members regularly talked and joked among themselves about non-soccer related topics, such as homework, social activities, and their personal lives (including dating and their sex lives). JA 1047-53. Debbie Keller (a 1996 team captain) described this as a time "at the beginning of practice to talk about our day and then get serious for practice." JA 1044. In terms of who talked about their personal lives during warm-ups, Keller described some women on the team "being very wide open about their personal lives," others being in an intermediate group, and others being reserved. JA 1053-56. Jennings testified that she did not participate in any of the players' discussions about their sexual activities. JA 1242-43, 1585.

Dorrance and Palladino would participate in these conversations during warm-ups, although witnesses describe the extent of their alleged participation differently. According to Keller, Dorrance and Palladino would walk through the large circle once or twice a week while the team was stretching and tease and joke around with team members about various topics, including who the players were dating and about their evenings the night before. JA 1057-59, 1061. Palladino would "generally laugh and listen." JA 1059; *see also* JA 1060-61. According to Keller, Dorrance "occasionally" would teasingly inquire about who a player was dating and about a player's sex life, but Dorrance did not make comments about personal dating or sex lives every time that he walked through the circle. JA 1066-68. Keller also stated that Dorrance sometimes would ask some team

members if they had been out drinking or would ask about team members' families. JA 1067.

Amy Steelman, who was on the team from the fall of 1995 through the fall of 1996, submitted a declaration stating that "when Anson Dorrance was around, he would encourage and participate in sexual discussions, sexual jokes, sexual talk, sexual banter, and sexual innuendos. A typical Monday afternoon included queries and discussions with Anson Dorrance into the team members' sexual . . . exploits . . . ." JA 1452. Steelman's declaration does not mention Palladino. *See id.*

According to Jennings, Dorrance would frequently participate in conversations at practice about players' personal lives, including their dating and sex lives. JA 1238-45, 1281-83, 1585. Dorrance allegedly would ask some team members with whom they were sleeping and encouraged discussion on other related topics. *See* JA 1452. Dorrance's remarks were often crude. For example, one player informed the team that she had had sex with one man, climbed out of his window, and then climbed into the window of another man's apartment to have sex with him. JA 1055, 1058. Dorrance was present and asked the player if she knew her sexual partners' names or whether she took tickets. JA 1236. He also referred to this player's sexual partner as the "f*** of the week." JA 1237.[1] In addition, according to Jennings, Dorrance would sometimes make comments about team members' bodies, including comments about team members'

[1] There is also evidence that Dorrance once questioned a player about the size of her boyfriend's genitalia (JA 1452), but there is no evidence Jennings overheard this question.

weight, legs, or chests. JA 1275-79. For example, Dorrance once said that a "top heavy" woman has a more difficult time playing soccer, and once described a woman's [*261] chest as her "rack." *See* JA 1236. Dorrance called another player "fat a**," JA 1228, told another player she had nice legs, (JA 1233), and commented on another players's "cute dimples," JA 1229. As for Palladino's conduct, Jennings testified that Palladino was present while Dorrance made comments, and "didn't do anything to stop it." JA 1291. [2]

Jennings also testified that while coaching the team in 1996 and 1997, Dorrance used profanity, including using the words "f***" and "unf***ingbelievable" and the phrases "what the f***," "f***ing brilliant," and "f***ing stupid." JA 1231-33, 1264-65, 1452. For example, he would use such

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[2] Dorrance describes his conduct very differently. He states in his affidavit: "I never initiated comments on those topics [of players' boyfriends and private lives], only infrequently heard players' comments on those subjects and even less frequently said anything to any player at those times about those subjects." JA 186; *see also* JA 777 (letter to Debbie Keller from Anson Dorrance dated March 19, 2004). Palladino likewise testified that he "never initiated discussions on those topics, only infrequently heard players' comments on those subjects and even less frequently said anything to any player at those times about those subjects." JA 336.

Several former soccer players who were on the team with Jennings submitted affidavits consistent with Dorrance's and Palladino's descriptions. (We refer to these players by their initials.) JA 320 (A.F. Affidavit); JA 324 (N.F. Affidavit); JA 330 (S.D. Affidavit); JA 332 (T.N.D. Affidavit). Because we review the evidence in the light most favorable to Jennings, we accept the truth of Jennings' testimony, Keller's testimony, and Steelman's testimony.

phrases when he believed that a player was out of position or made a poor pass. JA 1231. Dorrance admits that he sometimes used the word "f***" while coaching. JA 835.

As for comments that Dorrance directed at Jennings during practice during her two years on the team, Jennings testified that Dorrance never made any inappropriate comments about her body. JA 1243. Jennings also admits that Dorrance never threatened her, never touched her, never ogled her, and never propositioned her. She did testify, however, that she could recall two incidents during her two-year tenure on the team where her personal life was mentioned at practice. First, Jennings testified that on one occasion during her sophomore season (*i.e.*, 1997) prior to one practice, she and some teammates were sitting on some benches near the soccer practice field with Dorrance nearby. JA 1252-54. Dorrance asked one of the players whether her weekend visit with her boyfriend had been a "shag fest." JA 1249. The teammate, who apparently knew that Jennings had gone to visit her boyfriend at a different university the previous weekend, attempted to involve Jennings in the conversation, asking "What about Trim'n?" [3] JA 1246-48, 1252. According to Jennings, Dorrance "chimed in," asking either "So Trim'n[?]" or "yes, what about Trim'n?".[3] JA 1246, 1252. Jennings ignored the comments of her teammate and Dorrance and walked to the practice field to do "goalkeeper stuff." JA 1255. Second, during stretching prior to practice, one of Jennings' teammates once asked her whom she was dating. The teammate commented that

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[3] "Trim'n" was Jennings' nickname on the team. It was derived from her custom license plate and Jennings testified that it had no sexual connotation. JA 1246-47.

Jennings had talked to a male after the previous day's game and the teammate wanted to know if the male was a boyfriend or just a friend. JA 1257-59. Jennings responded that the male was just a friend. JA 1258. The teammate teased Jennings and said that he looked like more than a friend given that Jennings hugged him. *Id.* Dorrance and Palladino were present during this conversation between [*262] Jennings and her teammate, but Jennings does not remember whether Dorrance or Palladino said anything. JA 1258-60.

Beyond these two incidents, Jennings also complains that during a water break at practice, Jennings overheard Dorrance and Bill Prentice (a University athletic trainer) speaking. They were not speaking to Jennings. According to Jennings, Dorrance and Prentice made a comment which included the phrase "Asian threesome." Jennings interpreted the comment to be a description of a fantasy involving two teammates and one of the men. JA 1284-86. After the phrase "Asian threesome" was used, Jennings overheard Dorrance "kind of chuckle" and say "oh, yeah." JA 1285. That was the only time that Jennings heard Dorrance use the phrase "Asian threesome." JA 1286.

During the fall of 1996, Jennings met with Susan Ehringhaus, then Assistant to the Chancellor and Senior University Counsel. JA 1337-39, 1341. Jennings told Ehringhaus about a number of things relating to Dorrance including: (1) Dorrance failing to come visit Jennings in the hospital when she got sick during the fall of her freshman year (JA 1335); (2) Dorrance failing to tell the team that Jennings was in the hospital with an illness during the fall of her freshman year as an explanation for why Jennings

missed a game (JA 1338, 1340); (3) Dorrance directing Jennings to buy Gatorade for the team and the team's opponent due to a disruption of water supply in Chapel Hill arising from Hurricane Fran and then not reimbursing Jennings (JA 197, 1340-41, 1344-45, 1350); (4) Dorrance encouraging Jennings to attend parties where teammates were present even though Jennings told him that she did not want to attend because she was underage and some women were drinking alcohol at the parties (JA 198, 1338-40, 1347-48); and (5) Dorrance making sexual comments at practice, such as asking a team member who is "shacking up" and asking another teammate who a team member's "f*** of the week" is (JA 1341-44). During the conversation, Ehringhaus tried to get an understanding of the context of Dorrance's alleged conduct and comments. JA 1339-41, 1347. Jennings never told Ehringhaus that the sexual comments were directed at her. JA 1346-47. Ehringhaus encouraged Jennings to talk with Dorrance about all of these issues. JA 1342-44.

Later in the fall of 1996, Jennings again met with Ehringhaus and spoke to her about getting reimbursed $ 400 for buying the Gatorade. JA 1344-46. During that meeting, Jennings did not mention anything about sexual comments at practice. JA 1345-46. After that meeting, Craig Jennings (plaintiff's father) wrote a letter to the University about reimbursing his daughter for the Gatorade purchase. JA 1352-53, 1411. The letter said nothing about sexual comments at practice. Thereafter Dorrance reimbursed Jennings for buying the Gatorade. JA 1350-51.

Women's college soccer culminates in a tournament for the national championship. In December 1996, the soccer

team was in California for the Final Four. JA 1305. According to Jennings, that weekend Dorrance individually met with each player (including Jennings) in his hotel room for a routine end-of-year meeting. JA 1305-08. Jennings understood the meeting's purpose was to give each player a performance evaluation as an individual player, a student, and a team member. JA 1321-22.

After the player before Jennings had finished her meeting with Dorrance, Dorrance told Jennings to come in and have a seat at a table in his hotel room. JA 1308-09. Dorrance also took a seat at the table. JA 1311-12. After some small talk, Dorrance talked about Jennings' need to improve [*263] her grades because her grade point average ("GPA") was below 2.0 on a 4.0 scale. JA 1314-15. [4] Jennings believed that she was in danger of losing her athletic eligibility due to poor grades. JA 1315. Dorrance told Jennings that her grades were not acceptable and that she needed to bring them up. JA 1316. Dorrance then asked if she had been attending academic tutoring sessions. JA 1318. Jennings said that she had been attending the tutoring sessions. *Id.*

As part of the conversation about her grades, Dorrance then asked Jennings about whether her social life was adversely affecting her grades. JA 1329-30. As part of that inquiry, Jennings testified that Dorrance specifically asked Jennings, "Who are you f***ing?" and whether it was

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[4] At the end of Jennings' first semester, her GPA was 1.538 on a 4.0 scale. JA 1449.

adversely affecting her grades. JA 1329-30. [5] Although Jennings testified that Dorrance used the word "f***" a lot during practice, the question took her aback. JA 1330-31. Jennings immediately told Dorrance that her personal life was "none of his g** d*** business." JA 1325-26, 1331.

Dorrance then immediately dropped the subject of her grades and social life and started speaking with Jennings about her performance as a player. JA 1327, 1333. Jennings had played in two games during the year, a preseason game and a game when the team was "winning by a lot." JA 1334. Dorrance spoke to her about her playing statistics and conditioning statistics and told Jennings that she needed to improve as a player and improve her conditioning. JA 1327-28. Thereafter, the meeting ended. JA 1328-29, 1333.

Jennings returned to the soccer team in the fall of 1997. JA 1356. Jennings played in one or two games. *Id.* At the end of the season in the fall of 1997, Dorrance again had one-on-one meetings with all of the players, including Jennings. JA 1360-61. The meetings took place at "the Hut," which is a trailer next to the soccer practice field. JA 964. In the meeting with Jennings, Dorrance noted that Jennings' grades had improved, but could be better. JA 1361-62.[6]

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[5] Dorrance denies meeting with Jennings during the 1996 Final Four (JA 185) and also denies asking Jennings (or any other player) this question. JA 186, 1529. Of course, in reviewing an order granting summary judgment, we review the evidence in the light most favorable to Jennings and therefore accept the truth of her testimony on this point.

[6] Jennings' cumulative GPA at the end of her freshman year was (continued...)

Dorrance also told Jennings that she was not meeting the team standards for fitness and training or the team standards for contributing to positive team chemistry. JA 1362-63. Dorrance told Jennings that she was in danger of being cut from the team if her performance did not improve. JA 1363.

On May 5, 1998, Dorrance met with Jennings at the Hut. JA 1384, 183. Dorrance told Jennings that her fitness and conditioning statistics and her contributions to positive team chemistry were not at an adequate level and cut her from the team. JA 1387-90; *see also* JA 183, 282-84. Jennings is not the only reserve that Dorrance has cut from the team for failure to contribute to the team in two of the three areas in which reserve players are evaluated. JA 184.

Jennings testified that she was shocked and upset that she was cut. Up to that point, Jennings was happy with her performance on the team and believed she was improving. JA 1388. While on the [*264] team, Jennings never sought or received any psychological care or treatment. JA 1419-21, 656-67.

Craig Jennings (plaintiff's father) wrote Ehringhaus a letter dated May 12, 1998. JA 1543, 1551. Although Craig Jennings had complained in the fall of 1996 about the Gatorade incident and the presence of alcohol at parties, he now complained (for the first time) about questions and comments that Dorrance allegedly made at practice and

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[6] (...continued)
1.539, at the end of the 1997 summer session was 1.903, and at the end of the fall 1997 semester was 1.964. JA 1449-50.

during player reviews to women on the team about their personal lives. JA 1543, 1551. Craig Jennings' letter stated:

> During the past few days, I have learned much more concerning Coach Dorrance's actions towards our daughter Melissa over the past eighteen months. Mrs. Jennings and I believe that you and Chancellor M. Hooker would find some of these actions just as repulsive and not representative of the UNC staff. Coach Dorrance has in every player/coach review (except the one last week) and at the practice field asked the following questions:
>
> 1. Who is your boy friend? Are you seeing anyone? What does he do? Are you enjoying the UNC campus? We personally do not find these questions totally offensive, but the answers are Melissa's to give, if she chooses without retribution.
>
> 2. When answering yes to a boy friend or after bringing friends to team activities he then has asked the following: Are you sleeping with him? Are you shacking up with him? We find both of these questions totally inappropriate and harassing!
>
> 3. The Monday practice session team question has been on numerous occasions: Who is shacking up with whom? He will even question roommates on the field about the exploits of their teammates?

4. To one team member (not Melissa), he asked the team who her S-- for the week is/was? Like most of the team members, she can not respond because he totally owns her way through your fine institution and controls her ability to go to your school. This is the sickest form of harassment.

Items two through four above, we find extremely disturbing and completely inappropriate of any UNC staff member to ask a student, another UNC employee, and an athlete. We are also confident that this practice has gone on for more than just the past two years. Mrs. Jennings and I could be wrong and the UNC policies do allow staff members, professors, and managers to ask such personal questions of a student's very private activities. If that is the case, I believe every parent considering sending or keeping a student at UNC Chapel Hill should be made aware of what their student could expect.

We are also very disappointed that we have brought to your attention several very serious matters ie [sic]: forcing a player to give considerable money, participate in alcohol activities, and now the above. The coach has not recognized these as inappropriate activities and has only responded in a very negative manner including last week. I look forward to your phone call this week now that everyone is back in town.

JA 1551-52.

The University has had written policies against sexual harassment since the early 1990's, and had informed the students, staff, and faculty of the policies. *See* JA 199-200, 305-06, 719-25, 789-90, 923-26. Dorrance was aware of the policies. JA 804-05.

[*265] After Ehringhaus received Craig Jennings' May 12 letter, she forwarded the letter to Athletic Director Richard Baddour. JA 200. Thereafter, Senior Associate Athletic Director Beth Miller began an investigation. JA 264. Miller also arranged a meeting with Jennings, Craig Jennings, Ehringhaus, Baddour, Dorrance, and herself. JA 264-65, 266, 661-62.

Craig Jennings, met with Baddour, Miller, Ehringhaus, and Dorrance. JA 1400-02, 1479-80. Ehringhaus asked Jennings if she wanted to speak without Dorrance present, but Jennings declined because it did not matter to her that Dorrance was in the room. JA 1405. At the meeting, Jennings recounted (among other things) Dorrance's alleged conduct at practices (including inquiries about other players' personal lives and sexual comments) and his alleged comment to her in the one-on-one meeting in December 1996. JA 1404-06. Dorrance strongly denied ever discussing sexual activity in a one-on-one meeting with any player, but acknowledged that he participated in group discussions at practice of a jesting or teasing nature with women on the soccer team. JA 1404, 1531.

***Jennings*, 444 F.3d 255 (4th Cir. 2006), CONT'D . . .**

By letter dated June 9, 1998, Athletic Director Baddour wrote Craig Jennings a letter which stated:

> Any unwelcomed discussions, including jesting, regarding sexual activity and team members' relationships with men are inappropriate in the context you described. While Coach Dorrance strongly denies that he has ever discussed an individual team member's sexual activity in a one-on-one discussion, Coach Dorrance has acknowledged that he participated in group discussions of a jesting or teasing nature with soccer team members. This is altogether inappropriate. While his actions were not intended to be offensive, he now realizes that his involvement in such discussions is inappropriate, and he will immediately discontinue that activity. Appropriate interventions have also occurred with Coach Dorrance to address these unacceptable conversations.

JA 1531. Dorrance endorsed the apology. *Id.*

By letter dated June 10, 1998, Athletic Director Baddour wrote Dorrance a letter. It stated:

> As I indicated to you in our last meeting I am writing to officially notify you that it is inappropriate for you to have conversations with members of your team (individually or in any size group) regarding their sexual activity. Please refer to my letter of June 9, 1998 to Craig Jennings.

JA 1533; *see also* JA 1459, 1515-18.

II.

On August 25, 1998, Jennings and Keller sued the defendants. On November 13, 2002, the district court granted in part the defendants' motion to dismiss. *Jennings v. Univ. of N.C. at Chapel Hill,* 240 F. Supp. 2d 492 (M.D.N.C. 2002). The parties proceeded with discovery on the remaining claims, which included: (1) a Title IX claim against the University; (2) section 1983 claims for damages against Dorrance for invasion of privacy, against Dorrance and Palladino for sexual harassment, and against University officials Susan Ehringhaus, John Swofford, Richard Baddour, Beth Miller, and the estate of Michael Hooker [7] for failure to supervise Dorrance and Palladino and prevent the alleged violations of Jennings' rights; and (3) a common [*266] law invasion of privacy claim against Dorrance.

Keller settled her claims with the defendants. On March 24, 2004, Keller and the defendants filed a stipulation of dismissal with prejudice as to Keller's claims. *See* JA 15.

The defendants moved for summary judgment on all remaining claims. Jennings, the sole remaining plaintiff, opposed the motion for summary judgment and moved to strike the defendants' amended answer and for default judgment, alleging that Dorrance's deposition testimony contradicted assertions put forth in the amended answer. Jennings also moved to strike a number of exhibits attached

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[7] Michael Hooker died on June 29, 1999.

to Dorrance's affidavit, which had been submitted in support of the motion for summary judgment. On October 27, 2004, the district court granted summary judgment to the defendants on all remaining claims and denied plaintiff's motions. *Jennings v. Univ. of N.C. at Chapel Hill*, 340 F. Supp. 2d 666 (M.D.N.C. 2004).

Jennings filed a timely notice of appeal. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

III.

We review the district court's grant of summary judgment *de novo*. *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc). Summary judgment is appropriate when, after reviewing the record taken as a whole, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The party seeking summary judgment has the initial burden to show absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The opposing party must demonstrate that a genuine issue of material fact exists. Mere allegations or denials are insufficient. *Anderson*, 477 U.S. at 248. A mere scintilla of evidence supporting the case is also insufficient. *Id.*; *see also Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). We construe the evidence in the light most favorable to the non-moving party and draw all reasonable

inferences in the non-movant's favor. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587-88.

IV.

Title IX states in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2004). Title IX applies to the University, including its athletic department and women's soccer program. *See* 20 U.S.C. § 1687.

A.

In *Cannon v. University of Chicago*, 441 U.S. 677, 717, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), the Supreme Court held that Title IX is enforceable through an implied right of action. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 63-64, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), the Court analyzed a Title IX claim involving the alleged sexual harassment of a female high school student by one of her male teachers. The Court reviewed a motion to dismiss and addressed whether such a plaintiff could recover monetary damages from the school district (i.e., the Title IX [*267] funding recipient) or was limited to injunctive relief. *Id.* The Court held that the implied right of action under Title IX supports a claim for monetary damages against the school district. *Id.* at 76. The Court in *Franklin*, however, did not address the standard to be applied in assessing the validity of a sexual harassment claim under Title IX or the standard to be applied for liability to attach to the school district.

***Jennings*, 444 F.3d 255 (4th Cir. 2006), CONT'D . . .**

In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998), the Court addressed when a school district may be held liable for damages in an implied right of action under Title IX for the sexual harassment of a high school student by one of the district's teachers. The Court held "that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Id.* at 277. In *Gebser*, however, the Court did not address what a plaintiff would have to demonstrate to establish an actionable sexual harassment claim under Title IX.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999), the Court considered a case of alleged student-on-student sexual harassment in the fifth grade of an elementary school. The Court held that a private damages action may lie against a school board in the case of such student-on-student harassment "but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities." *Id.* at 633. The Court noted that "sexual harassment is a form of discrimination for Title IX purposes . . . ." *Id.* at 649-50. The Court held that a "plaintiff [in a student-on-student case] must establish sexual harassment . . . that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim's educational experience that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.* at 651 (citing *Meritor Sav. Bank, FSB*

v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)).

"Whether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships' . . . including, but not limited to, the ages of the harasser and the victim and a number of individuals involved . . . ." *Davis*, 526 U.S. at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); citing OCR Title IX Guidelines 12041-42 (1997)). As an example of actionable student-on-student harassment under Title IX, the Court discussed male students physically threatening their female peers "every day, successfully preventing the female students from using a particular school resource -- an athletic field or computer lab, for instance." *Id.* at 650-51. If school district administrators were "well aware of the daily ritual, yet they deliberately ignored requests for aid from the female students wishing to use the resource . . . [then] the district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages." *Id.* at 651.

B.

A plaintiff asserting a Title IX hostile environment claim must show: (1) that she belongs to a protected group (e.g., [*268] a student at an institution covered by Title IX); (2) that she was subjected to harassment based on her sex;

(3) that the harassment was sufficiently severe or pervasive [8] to create an abusive educational environment; and (4) a cognizable basis for imputing institutional liability under Title IX. *See Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 745-53 (2d Cir. 2003); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002). [9]

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[8] It is unclear whether the heightened standard of "severe, pervasive, and objectively offensive" announced in the student-on-student harassment context in *Davis* also applies to teacher-on-student harassment cases. *See Davis*, 526 U.S. at 649-51. *Compare Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 745 (2d Cir. 2003) (applying "severe or pervasive" standard in teacher-on-student harassment case) *with Johnson v. Galen Health Insts., Inc.*, 267 F. Supp. 2d 679, 685 (W.D. Ky. 2003) (ultimately applying "severe, pervasive, and objectively offensive" standard in teacher-on-student harassment case). At summary judgment in this case, the district court applied the heightened standard stated in *Davis*. *Jennings*, 340 F. Supp. 2d at 674. The parties did not brief this issue and were at times internally inconsistent as to what standard should apply. (*Compare* Appellees' Br. 19 (stating that "severe or pervasive" standard governs) *with* Appellees' Br. 32 (stating that "severe, pervasive, and objectively offensive" standard governs); *compare* Appellant's Opening Br. 21 (referencing "severe, pervasive, and objectively offensive" standard) *with* Appellant's Opening Br. 16, 19 (referencing "severe or pervasive" standard).) Because we conclude that plaintiff's claims fail under the lower "severe or pervasive" standard, we need not determine whether the more rigorous standard articulated in *Davis* applies in this case.

[9] Title IX was enacted pursuant to Congress' spending power and prohibits discriminatory acts by funding recipients. Because school officials are not funding recipients under Title IX, school officials may not be sued in their individual capacities under Title IX. *Hartley*

(continued...)

In analyzing whether a person was subjected to actionable sexual harassment under Title IX, courts have looked to precedent under Title VII. *See, e.g., Frazier,* 276 F.3d at 65-66; *see also Smith v. Metro. Sch. Dist. Perry Twp.,* 128 F.3d 1014, 1023 (7th Cir. 1997); *Lam v. Curators of the Univ. of Mo.,* 122 F.3d 654, 656-57 (8th Cir. 1997). Courts have done so because the Supreme Court in *Franklin and Davis* cited its Title VII jurisprudence. *See Davis,* 526 U.S. at 651; Franklin, 503 U.S. at 75.

In examining whether a plaintiff was subjected to actionable sexual harassment under Title VII in the form of a hostile work environment, we have stated that "a female plaintiff must prove that the offending conduct (1) was unwelcome, (2) was based on her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer." *Ocheltree v. Scollon Prods., Inc.,* 335 F.3d 325, 331 (4th Cir. 2003) (en banc). As for imputing liability to a Title IX funding recipient, Title IX "conditions 'an offer of funding on a promise by the recipient

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[9] (...continued)
v. Parnell, 193 F.3d 1263, 1270 (11th Cir. 1999) (holding that individual school officials may not be held liable under *Title IX); Kinman v. Omaha Pub. Sch. Dist.,* 171 F.3d 607, 611 (8th Cir. 1999) (collecting cases); Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1021 (7th Cir. 1997) (holding that because "neither a principal nor an assistant principal can be considered a grant recipient," plaintiff's Title IX claim against those persons must fail); *see also Nat'l Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459, 468-69, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999) (receipt of dues from member colleges and universities does not subject NCAA to suit under Title IX).

not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.'" *Baynard v. Malone,* 268 F.3d 228, 237 (4th Cir. 2001) (quoting *Gebser,* 524 U.S. at 286). Title IX [*269] requires that a funding recipient must actually be aware of the discrimination and fail to remedy it. *Id.* "In other words, a [funding recipient] may be held liable under Title IX 'only for its own misconduct'; the implied damages remedy is available only when 'the funding recipient engages in intentional conduct that violates the clear terms of the statute.'" *Id. (quoting Davis,* 526 U.S. at 642).T he funding recipient cannot be held liable under principles of *respondeat superior* or constructive notice. *Id.* "'A damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [funding recipient's] behalf has actual knowledge of discrimination and is deliberately indifferent to it.'" *Id.* (quoting *Gebser,* 524 U.S. at 290).

C.

Jennings argues that a genuine issue of material fact exists as to whether Dorrance and Palladino created a hostile environment based on her sex under Title IX. Jennings relies on the regular nature of Dorrance's sexual comments at practice during her two years on the team, the severity of the question in the hotel room in December 1996, the age difference between Dorrance and the plaintiff, and the position of power Dorrance held over the plaintiff as her college soccer coach. The defendants respond that the conduct was not sufficiently severe or pervasive, that the

conduct was not based on Jennings' sex, and that no basis exists to impute liability to the University.

In analyzing an alleged hostile work environment based on sex in the Title VII context, the "conduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton,* 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). The work environment must have been "permeated with discriminatory intimidation, ridicule and insult . . . that was sufficiently severe or pervasive to alter the conditions" of plaintiff's work environment and have created a hostile environment based on sex. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (quotations omitted). This standard "protects . . . working women from the kind of male attentions that can make the workplace hellish for women." *Ocheltree,* 335 F.3d at 333 (quotation omitted); *see Anderson v. G.D.C., Inc.,* 281 F.3d 452, 456-59 (4th Cir. 2002); *Smith v. First Union Nat'l Bank,* 202 F.3d 234, 238-43 (4th Cir. 2000). At the same time, "conduct that is not severe or pervasive enough to create an objectively hostile or abusive . . . environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview." *Harris,* 510 U.S. at 21.

Under Title VII, a court must look at all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id. at 23.* No one factor is dispositive. However, simple teasing, sporadic use of abusive language,

offhand comments, gender-related jokes, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Faragher,* 524 U.S. at 788. Title VII is not intended to serve as a workplace civility code, is not designed to purge the workplace of vulgarity, and does not countenance a federal cause of action for unpleasantness. *Id.*; *Anderson,* 281 F.3d at [*270] 459; *Hartsell v. Duplex Prods., Inc.,* 123 F.3d 766, 773 (4th Cir. 1997). Likewise, the totality-of-the-circumstances analysis recognizes that some behavior would be abusive in one setting, but not abusive in another setting. *See Oncale,* 523 U.S. at 81 (a football player's environment "is not severely or pervasively abusive. . . if the coach smacks him on the buttocks as he heads onto the field -- even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office").

Under Title VII, the "severe or pervasive" requirement has both subjective and objective components. *Harris,* 510 U.S. at 21-22. The objective component helps courts to "police the baseline for hostile environment claims." *Mendoza v. Borden, Inc.,* 195 F.3d 1238, 1244 (11th Cir. 1999) (en banc) (quotation omitted); *see also Anderson,* 281 F.3d at 458-59; *Hartsell,* 123 F.3d at 773. The Supreme Court in *Faragher* made clear that the "conduct must be extreme" to be actionable and that lower courts had appropriately applied the objective component and granted summary judgment where "the alleged harassment was not actionably severe or pervasive." 524 U.S. at 788. On one side lies "the merely vulgar and mildly offensive" and on the other lies "the deeply offensive and sexually harassing."

Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) (quotation omitted).

Before and after *Faragher*, in the context of motions for summary judgment or motions for judgment as a matter of law, we have applied the objective component to determine whether a reasonable jury could find the alleged conduct to be actionably severe or pervasive. For example, in *Hartsell*, we affirmed the entry of summary judgment where male co-workers made comments to a female employee, over a three-month period including: 1) stating that the male workers had made every female employee "cry like a baby" and would do the same to her; 2) stating that more "buxom" women were needed at the office; 3) asking the plaintiff if she would become a "mini van driving mommy"; and 4) stating that the plaintiff should go home to "fetch [her] husband's slippers like a good little wife." *Hartsell*, 123 F.3d at 773. The court noted that there were no allegations that the plaintiff had been "inappropriately touched, propositioned, flirted with, taunted, or even ogled." *Id.* The court also noted that "the only vulgarities documented in the record -- a reference to masturbation and profane name-calling -- were uttered by Hartsell herself." *Id.*

Similarly, in *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745 (4th Cir. 1996), we upheld summary judgment for the employer in a Title VII same-sex sexual harassment case because the alleged harassment was insufficiently severe or pervasive to create an objectively hostile work environment. In *Hopkins*, over a seven-year period, the supervisor at issue approached the plaintiff in the bathroom and said "Ah, alone at last," wrote "kiss, kiss" and drew hearts on office mail directed to the plaintiff, asked the

plaintiff if he had gone on dates or had sex with anyone recently, tried to greet the plaintiff at his wedding by kissing him, placed a magnifying lens over the plaintiff's crotch and asked "Where is it?", asked the plaintiff how much he liked the supervisor, tried to squeeze through doors at the same time as the plaintiff in an effort to make physical contact, and regularly commented on the plaintiff's appearance. *Id. at 747-48.* In affirming summary judgment, we noted that the supervisor's conduct occurred over several years and that most of the conduct and sexual comments took place in [*271] group settings and were not directed at plaintiff. *Id.* at 753. We also noted that the supervisor never "made an overt sexual proposition or touched [the plaintiff] in a sexual manner," and concluded that, while the conduct at issue was "inappropriately forward," no reasonable jury could find that the conduct was actionably severe or pervasive. *Id.*

Of course, we also have ruled on several occasions that questions of severity and pervasiveness should go to the jury. For example, in *Smith v. First Union National Bank*, 202 F.3d 234 (4th Cir. 2000), we reversed the entry of summary judgment for the defendant-employer after concluding that the conduct of the plaintiff's supervisor created a genuine issue of material fact as to whether the conduct was actionably severe or pervasive. *Id.* at 243. This conduct included "a barrage of threats and gender-based insults" that plaintiff's supervisor directed at her and that occurred more than thirty times in the first few weeks of plaintiff's employment. *Id.* at 238. The supervisor routinely directed demeaning comments about women at the plaintiff such as stating that the only way a woman could get ahead at the bank was to "spread her legs." *Id.* at 239. This conduct also included threatening language such as directing the plaintiff

that she should carry out his orders "or else," and that he could "see why a man would slit a woman's throat." *Id.* The latter comment was made after the supervisor spun the plaintiff around in her chair to face him. *Id.* We stated that "[a] work environment consumed by remarks that intimidate, ridicule, and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances." *Id.* at 242. We distinguished *Hartsell*, in part, on the grounds that the behavior in *Smith* included physical threats. *Id.* at 243; *see also Ocheltree,* 335 F.3d at 328-29, 333 (finding that daily vulgar talk and antics of male co-workers in a work environment where the plaintiff was the sole female employee, when coupled with three incidents directed at plaintiff including simulation of sex acts on mannequins directed at plaintiff, vulgar and graphic jingles directed at plaintiff, and vulgar and graphic pornography presented to plaintiff, were sufficient evidence for a reasonable jury to find the conduct actionably severe or pervasive); *Anderson,* 281 F.3d at456-59 (overturning judgment as a matter of law after concluding that "barrage" of sexual comments directed at plaintiff on "daily basis" (including a threat to rape her) was "unquestionably sufficient" to create a jury question as to whether the conduct was actionably severe or pervasive); *EEOC v. R&R Ventures,* 244 F.3d 334, 337-40 (4th Cir. 2001) (jury question on whether the harassment was actionably severe or pervasive where male supervisor directed daily sexual jokes and discussions of sexual positions and sexual experiences at 15-year-old female employee, repeatedly asked if she liked to be spanked, and frequently said women were stupid as compared to men; and where the same supervisor constantly flirted with a 20-year-old female employee, complained to her about how long it

had been since he had sex, repeatedly made sexual comments to her, and belittled her in front of her co-workers); *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 193-99 (4th Cir. 2000) (jury question on whether the harassment was actionably severe or pervasive where plaintiff, over a two-year period, was frequently given demeaning tasks and fewer opportunities for promotion than male counterparts, routinely asked if she "got any" the previous night or was "on the rag," was regularly mocked, ridiculed, and physically threatened by male co-workers, and was forced [*272] to remove the rags covering the bloodstains on her pants after suffering uterine bleeding).

Using these Title VII cases as a helpful guide to examine the Title IX environment at issue in this case, we now examine the evidence that Jennings cites to support her argument that the environment to which she was exposed was sufficiently severe or pervasive to raise a jury question. Jennings relies on the following: (1) the sexual banter that Dorrance engaged in at practice with other women on the team and a comment that she once overheard Dorrance make at practice; (2) the "severe" nature of the question Dorrance asked her in December 1996; (3) two incidents at practice where her personal life was mentioned; (4) the age difference between plaintiff and Dorrance; and (5) the position of power that Dorrance had over her arising from his position as the soccer coach.[10]

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[10] Although Jennings presses her claims against Palladino on appeal, the record establishes no grounds on which his actions could be held to have subjected her to a hostile environment based on her sex. Even the dissent concludes that Jennings' claims against

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As for the sexual banter that Jennings heard at practice while stretching during her two years on the team, this banter occurred in a group setting as approximately 26 women on the team warmed up for a short period of time before practice and talked about a number of topics, including schoolwork, social lives, who they were dating, and their sex lives. These comments were not directed at Jennings. Tellingly, Jennings does not appear to object to some of her teammates talking about their sex lives. Rather, she objects to Dorrance participating in the conversations. Even if we assume Dorrance's participation in these conversations constitutes harassment, such "'second-hand' harassment, although relevant, [is] less objectionable than harassment directed at the plaintiff." *Moser v. Ind. Dep't of Corr.*, 406 F.3d 895, 903 (7th Cir. 2005). For example, in *White v. Federal Express Corp.*, 939 F.2d 157, 161 (4th Cir. 1991) (*per curiam*), we rejected the plaintiff's race-based hostile work environment claim where it rested on a racially offensive exchange not directed at plaintiff. Likewise, in *Hopkins* we upheld the entry of summary judgment in the plaintiff's sex based hostile work environment suit for several reasons, including that most of the incidents about which the plaintiff complained took place in group settings and were not directed at the plaintiff. *Hopkins,* 77 F.3d at 754. Similarly, although the conduct in *Ocheltree* took place in a group setting within a manufacturing facility, the plaintiff in *Ocheltree* was the sole female employee in the group and we concluded:

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[10] (...continued)
Palladino fail as a matter of law. *Post* at 57 n.3.

> Here, a reasonable jury could find that, taken together, the various mannequin incidents, the vulgar song and picture, and the graphic descriptions of sexual activity (especially oral sex) that consistently painted women in a sexually subservient and demeaning light were sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and to create an abusive work environment. After a time, Ocheltree was subjected every day to some variety of this offensive conduct, which was humiliating to her personally and to women in general. The harassment became so offensive at times that it drove Ocheltree from the room. It surely made it more difficult for her to do her job. A rational jury could find that a reasonable person in Ocheltree's situation would regard the work environment at Scollon Productions as abusive.

[*273] *Ocheltree,* 335 F.3d at 333; *see also Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 184-86 (4th Cir. 2001) (considering both second-hand harassment as part of the general environment (including daily racial epithets) and an "incessant racial invective" targeted at plaintiff "individually").

The record also indicates that Jennings' teammates who engaged in these conversations did not find the conversations offensive. *See* JA 320-31. Further, the comments hardly painted women in a sexually subservient, negative, or demeaning light. Instead, according to Jennings, the comments related to consensual sexual behavior that some

team members engaged in with their boyfriends or dates. Even if Dorrance encouraged and participated in these discussions, no evidence indicates that the women participating in the conversations were unwilling participants. In fact, Keller described the process of warming up before practice and the conversations that took place. According to Keller, some women were "wide open" about their personal lives, others were in an intermediate group, and others were reserved. JA 1053-56. Jennings acknowledges that she never participated in the discussions. JA 1242-43, 1585.

As for once overhearing Dorrance and a male trainer use the phrase "Asian threesome" at a water break during practice, Jennings admits that neither the conversation nor the reference related to her or was directed at her, and that she only heard Dorrance use that phrase one time. At most, this comment is an offensive utterance.

Without ignoring the background conversations mentioned above, we now turn to conduct directed at the plaintiff during her two years on the team. Jennings identifies three incidents. The primary incident involves her one-on-one meeting with Dorrance while the team was in California at the December 1996 Final Four. Dorrance told Jennings that her grades were not acceptable, asked whether her social life was affecting her grades, and then asked, "Who are you f***ing?", and whether that was affecting her grades. Jennings responded that her personal life was "none of his g** d*** business" and Dorrance did not make any further inquiry about her sex life. A second episode arose in which a teammate asked Jennings about a visit with her boyfriend, and Dorrance, overhearing the conversation,

asked either "So, Trim'n[?]" or "yes, what about Trim'n?" Jennings ignored the inquiries from her teammate and Dorrance and went to the practice field. Finally, a teammate once asked Jennings whether a man in the stands was her boyfriend and Dorrance allegedly was present during the conversation but did not say anything. [11]

As phrased, Dorrance's question in the hotel room clearly was inappropriate. At the same time, as Jennings' coach, Dorrance certainly had an interest in her academic performance and determining whether her social life was contributing to her poor academic performance. The question was not physically threatening and not a sexual proposition. Rather, it was an offensive utterance from a coach to a player in the context of inquiring about Jennings' poor grades -- grades that were so poor that she believed her athletic eligibility was in jeopardy. Moreover, her forceful rejection of Dorrance's inquiry undercuts the notion that his age and power (as her coach) transformed this one question into a "severe" example of sexually harassing behavior, such as a sexual assault [*274] or rape. [12] Likewise, the "Trim'n"

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[11] Not even the dissent relies on this third incident. Rather, the dissent focuses on two comments directed at Jennings during her two years on the team. *Post* at 43.

[12] The dissent states that "a rational jury could find that Dorrance's question [in the hotel room in December 1996] constituted sexual harassment, particularly in light of his pattern of asking many of his players the same sort of question." *Post* at 53. We do not believe that this one question in the hotel room transforms this case into one of those exceptional cases where a single incident of sexual harassment, such as sexual assault or rape, has been deemed sufficient to raise a

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comment was nothing more than an offhand comment by Dorrance as a follow-up to teasing from a teammate. As for the teammate's inquiry about whether someone was Jennings' boyfriend, Dorrance was simply a bystander and did not participate in that simple teasing.

In analyzing this case, we do not ignore Dorrance's role as a college soccer coach or the context in which this conduct occurred. We are not examining the atmosphere in a typical university classroom with a typical university instructor or even the atmosphere in a typical workplace. Instead, we recognize that Dorrance (like many college coaches) was in a different position vis-a-vis the women on the team than a typical university instructor. A typical college coach is going to have much more informal, casual, one-on-one contact with a student-athlete than a typical university instructor will have with a student. College sports often involve long daily practice sessions, overnight travel, down-time before and after games and practices, and the need for a coach to discuss issues associated with academic performance, athletic performance, and health (including such topics as diet, weight, and physical fitness). Additionally, although this case does not involve any issue of improper touching, a college coach is much more likely to

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[12] (...continued)
jury question. *See supra* at 20-22 (analyzing Fourth Circuit precedent); *see also Mendoza*, 195 F.3d at 1244-52 (surveying Title VII sexual harassment cases from other circuits). Indeed, the Supreme Court has stated that "the 'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." *Harris*, 510 U.S. at 21 (quoting *Meritor Savings Bank, FSB*, 477 U.S. at 67).

demonstrate an athletic move with a hands-on demonstration and more likely to celebrate an individual or team success with a high five or a hug. Likewise, some coaches will use profanity, slang, sarcasm, or hamhanded humor, or will yell at a player or group of players to express displeasure, to make a point, or to motivate. Such lapses in linguistic gentility do not necessarily equal a sexually hostile educational environment. This is true whether the coach is a woman coaching women, a man coaching men, a woman coaching men, or a man coaching women.

At the same time, we realize that a college coach does have the ability to control playing time, retention of a scholarship, or whether a person remains on the team. We also realize that most college coaches (as in this case) are going to be older than the men or women that they coach. [13] These factors do place the coach in a more powerful position than the college athlete. The objective totality-of-the-circumstances inquiry, however, allows a court to analyze all of these factors in the context of whether a given coach-player interaction has crossed the line separating "the merely vulgar and mildly offensive" to "the deeply offensive and sexually harassing." *Baskerville,* 50 F.3d at 431 (quotation omitted); *see Oncale,* 523 U.S. at 81.

[*275] In this case, we conclude that no reasonable jury could find that Dorrance's remarks during Jennings' two-year tenure on the team were sufficiently severe or pervasive to

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[13] Jennings was age 17 when she entered the University in August 1996 and age 19 when she was cut from the team in May 1998. *See* JA 1449. Dorrance was age 45 to 47 during the relevant time period. *See* JA 804.

create a sexually hostile educational environment. A recent Title IX case dealing specifically with the interaction between a collegiate athlete and her coach supports the conclusion that Dorrance's actions do not create a jury question as to whether the alleged conduct was sufficiently severe or pervasive. In *Klemencic v. Ohio State University,* 10 F. Supp. 2d 911 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001), the district court granted summary judgment for Ohio State University against a student athlete's Title IX claim that her college coach created a hostile educational environment. Klemencic, a cross-country runner whose eligibility to compete had expired but who still wished to train with the team, alleged that the school's male cross-country coach created a hostile environment over a two-year period by asking her out on two dates, sending her a sexually suggestive photograph and article cut from a tabloid magazine, offering her rides home from practice, extending the use of his apartment when her lease expired, and asking about her relationship with her boyfriend. *Klemencic,* 10 F. Supp. 2d at 916-17. Assuming these alleged facts as true for purposes of summary judgment, the district court held that these actions did not "appear to have been more than 'merely offensive,' if offensive at all," and granted Ohio State's motion for summary judgment. *Id.* at 917 (citation omitted). On appeal, the Sixth Circuit affirmed. *Klemencic,* 263 F.3d at 511.

Plaintiff cites a number of cases where courts have held that a jury question existed as to the severity or pervasiveness of alleged harassment, but those cases are easily distinguished. In *Doe v. Green,* 298 F. Supp. 2d 1025 (D. Nev. 2004), a 14-year-old high school student was seduced into a sexual relationship with her coach. In *Hayut*

v. State University of New York, 352 F.3d 733 (2d Cir. 2003), a college professor specifically directed comments at the plaintiff every week in a university class. The student supposedly resembled Monica Lewinsky, and the professor likened plaintiff to Monica Lewinsky in class, referred to her as "Monica" almost every class period during the entire semester, and repeatedly directed crude references at her both in and out of class such as "I will give you a cigar later," and "How was your weekend with Bill?" *Id.* at 738-39. The professor directed these comments at the student during the Clinton-Lewinsky sex scandal. *Id.* [14] These cases are not analogous to the conduct at issue in this case.

In light of our holding that the alleged conduct was not sufficiently severe or pervasive to create a sexually hostile educational environment, we need not address the

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[14] The dissent asserts that "evidence that other players shared Jennings' humiliation and discomfort indicates that she was objectively reasonable in finding Dorrance's comments offensive and humiliating." *Post* at 49-50 (citing *Hayut*, 352 F.3d at 747). The dissent then claims that *Hayut* characterized "reactions of plaintiff's peers as 'significant to the mandated objective analysis' of whether conduct was sufficiently severe to be actionable under Title IX." *Id.* at 50.

The dissent misreads *Hayut*. In *Hayut*, the court was discussing other students' reactions to the conduct that the professor directed at the plaintiff, not conduct that the professor directed at other students. *Hayut*, 352 F.3d at 747. Notably, the only evidence that Keller and Steelman testified that Dorrance directed at Jennings was the Gatorade incident in September 1996. *See* JA 1072, 1156-57, 1453. As explained *infra* at 30-31, the Gatorade incident is completely irrelevant to Jennings' claims.

University's argument that the conduct [*276] was not because of plaintiff's sex. *Cf. Ocheltree,* 335 F.3d at 331-32 (analyzing "because of sex" inquiry under *Title VII); Bowman v. Shawnee State Univ.,* 220 F.3d 456, 463-64 (6th Cir. 2000) (same). Likewise, we need not address whether any cognizable basis exists to impute liability to the University under *Gebser* and *Davis. See Baynard,* 268 F.3d at 237 (discussing the *Gebser/Davis* standard).

D.

We acknowledge, but respectfully disagree with the dissent. In many instances, the dissent relies on evidence that is not relevant to Jennings' claims or evidence that does not support Jennings' claims to the extent that the dissent suggests. We comment on a few.

The dissent incorrectly attempts to rely on large portions of Keller's testimony in connection with Jennings' claims. For example, the dissent asserts that Keller testified that Dorrance "would make inappropriate sexual comments to players 'anytime the team was together,' whether 'on a plane, in a car, or on a bus, in a hotel, at practice, out of town, at events.'" *Post* at 40 (citing JA 1066). This assertion is incorrect. Keller was asked, "Was there inappropriate conduct other than at team time by Dorrance?" JA 1066. In response, she testified, "*It could be*, you know, when we're out of town, on a plane, in a car, or on a bus, in a hotel, at practice, out of town, at events, I mean anytime the team was together." JA 1066 (emphasis added). Keller was then asked, "And what was the inappropriate conduct that you believe he engaged in?" JA 1067. Keller replied, "Just getting into

individuals' personal lives of who they're dating, who they're sleeping with, whether they're sleeping with someone, whether they're not, how hung over they are, how much they're drinking, any of - - all of that." JA 1067. Keller was then asked for specific incidents. JA 1067. She testified about two. JA 1068-71.

The first incident involved Dorrance allegedly telling Keller (when they were alone together at a restaurant for lunch) that "he would die to be a fly on the wall the first time that [Keller's] roomate[, a fellow player and born-again Christian,] had sex." JA 1068. The dissent makes much of this comment in connection with Jennings' claims, but fails to mention that Dorrance allegedly made this comment to Keller in the spring of 1994 -- more than two years before Jennings enrolled at the University. JA 1068. The dissent also states that "Keller relayed this comment to some players, including Jennings, to indicate how stunned and appalled she was by it." *Post* at 41. However, the record reflects that although Jennings said that Keller told her about this spring 1994 conversation, Jennings did not testify when the conversation with Keller occurred. JA 1237.

The second incident involved Dorrance "joking around" at practice and "making fun" "[of teammate A.F. who] was with more than one person in one night." JA 1071. Keller was then asked, "What's the next thing you remember [Dorrance] doing that was inappropriate? And we're still talking about the team now." *Id.* Keller responded: "I know. I mean it would just be more -- I can't -- I mean it happened more than once. The [A.F.] comment was probably the worst, but you know, just comments about people's individual lives at practice would be what followed that. And

then the other specific ones after that I don't -- I can't think of at the moment." JA 1071.

The dissent also cites Keller's testimony for the proposition that Dorrance "asked another player if she was 'going to have [*277] sex with the entire lacrosse team,' and he advised another player 'You just have to keep your knees together . . . you can't make it so easy for them.'" Post at 41 (citing JA 1127). The dissent, however, fails to note that Keller did not testify that these comments were made during the one year that Keller and Jennings were teammates (*i.e.*, the 1996-97 school year) (*see* JA 1123-27) and fails to note that Jennings never testified that she heard these comments.

As for Keller's specific testimony about Jennings, Keller was asked, "What do you know of any inappropriate conduct that [Dorrance] had with Melissa Jennings?" JA 1071-72. Keller responded that they were only teammates for one year and that "the only one that I was told or was made aware of was an incident when I was captain and he made her go withdraw money from a bank and use it for team -- it was after the hurricane, and use it to get the team water. We were out warming up, because I was a senior at that time. And that's the only one I was made aware of." JA 1072. Later in her testimony, Keller clarified that she did not witness this incident. Rather, Jennings told her about the incident, either before or after they filed suit together. JA 1156-57.

Although Keller testified that the incident involved water, the incident actually involved Gatorade. As to the Gatorade incident, the dissent states that "Dorrance let Jennings know at the beginning of her freshman year that she was within his sights. He singled her out in front of the entire

team, labeling her as 'rich' and ordering her to withdraw $ 400 from her bank account to pay for a team supply of Gatorade." Post at 48 (citing JA 1301-02). Whatever the propriety of Dorrance's conduct in connection with the Gatorade incident, Title IX has nothing to do with alleged harassment based on wealth. Accordingly, we view the Gatorade incident in September 1996 as completely irrelevant.

The dissent also claims that "Dorrance showed overt affection for one player, Keller, in front of the entire team." *Post* at 41. In support of this claim, the dissent cites, inter alia, Steelman's declaration. *Id.* Steelman's declaration states that "in the beginning, I observed Anson Dorrance's inordinate attention towards Debbie Keller. I observed him touching her, particularly putting his arm around her shoulder, dangling his hand in front of her chest. I observed him touching her hair. I recall Debbie's body language indicating strong discomfort, frequently rolling her eyes and giving a grimaced look. My observation was that the touching made Debbie unhappy and the touching was not consented to." JA 1452-53.

Steelman was on the team in 1995 and 1996. JA 1451. Thus, "in the beginning" means 1995 -- a time period before Jennings joined the team in August 1996. Further, the dissent fails to mention that Jennings never testified to making the same alleged observation as Steelman. *Cf.* JA 1290-91. In fact, not even Keller testified that Dorrance "dangled his hand in front of [Keller's] chest."

Finally, as to Keller, the dissent states: "According to Jennings, during one weight-lifting session when the players

were lightly clad, Dorrance called Keller over and walked her outside 'towards the stadium, putting his arms around her.'" *Post* at 41-42 (quoting JA 1432). The record, however, reveals that Jennings described the weight room incident as follows: "We are in the weight room,[Debbie Keller] goes off and talks with [Dorrance] in the bleachers." JA 1290.

The dissent also states that "A few players reacted tearfully [to Dorrance's comments at practice] saying,'I can't believe [*278] him. Why would he say that?' or "I can't believe he would say that. I never do that." *Post* at 42 (citing JA 1239-41, 1269-71). The citation reference is to Jennings' opinion testimony about her teammates A.F. (JA 1239-41) and S.D. (JA 1269-71). The A.F. reference relates to Dorrance's alleged comments at practice about A.F.'s sex life. The S.D. reference relates to Dorrance's alleged reference at practice to S.D.'s breasts and her being top-heavy. JA 1269-71. In Jennings' opinion, Dorrance's comments upset A.F. (JA 1241-42) and S.D. (JA 1269-71).

A.F. and S.D. submitted affidavits denying that Dorrance ever madeany comments to them that were "unwelcome or inappropriate within the context they were made and they were neither harsh, severe nor frequent." JA 330; *see also* JA 321-23. A.F. also stated that "Coach Dorrance never said anything to me which I considered to be personally hurtful." JA 322. She continued: "I never knew of any of my teammates to complain about Dorrance's comments on their personal lives or state that his comments made them feel uncomfortable. I myself felt extremely comfortable around . . . Dorrance." JA 323. S.D. stated that "I was never offended by any comments that Dorrance made during these discussions or conversations." JA 331. Jennings'

conclusory "opinion" and "conclusory assertions" about the state of mind of A.F. and S.D. are not enough to withstand summary judgment. *See Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988).

The dissent states that "as Jennings explained, many players feared that 'if they gave any sort of opposition [to Dorrance's comments] . . . [their] playing time [would be] gone, [their] career [would be] gone.'" Post at 42-43 (quoting JA 1227). The dissent fails to state that, in giving this opinion, Jennings failed to identify any player (other than herself) who apparently has this alleged subjective fear. *Cf.* JA 1226-28. Moreover, although Keller did reference a similar subjective fear in her testimony, Keller admitted that she could not think of *one* time during her four years on the team that Dorrance made a decision about who would play based on things other than their ability to contribute to the team's victory and could not think of *one* woman who Dorrance retaliated against because the woman objected to or complained about his treatment. JA 1183-84.

The dissent also acknowledges that the banter at the beginning of some practices (including Dorrance's remarks) related to consensual sexual activities of certain women on the team. *Post* at 48-49. The dissent claims, however, that simply because Dorrance's remarks did not portray women as sexually subservient does not mean that "Dorrance's remarks were no less degrading because of that." *Post* at 49. In support, the dissent cites a student note from the Rutgers Law Review that allegedly surveyed "sociological and theoretical research." *Id.* (citing Ann Marie Pinarski, *When Coaches "Cross the Line": Hostile Athletic Environment*

Sexual Harassment, 52 Rutgers L. Rev. 911, 926-31 (2000) (hereafter "Pinarski, When Coaches Cross the Line")).

The "sociological and theoretical research" cited in the student's Rutgers Law Review note consists of a description of the legal scholarship of "feminist legal scholars who argue for a reconceptualization of sexual harassment" due to "the inadequacies of the current paradigm for evaluating sexual harassment claims." Pinarski, When Coaches Cross the Line, 52 Rutgers L. Rev. at 924. The student note then interprets the allegations against Dorrance "based on the integrated feminist framework" [*279] described in the note. *See id.* at 931; *see also id.* at 938-43.

We assume that the dissent is not relying on this "sociological and theoretical research" for evidentiary purposes. After all, the research was not cited by the parties in this court or the district court, the district court had no opportunity to perform its "gatekeeping" function in connection with the "research" under Fed. R. Evid. 702, and an appellate court reviewing a grant of a motion for summary judgment may examine only the evidence that was before the district court at the time the ruling was made. *See, e.g., Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 242 (4th Cir. 2002); *Katir v. Columbia Univ.*, 15 F.3d 23, 25 (2nd Cir. 1994) (*per curiam*); *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 n.3 (11th Cir. 1992). Rather, we assume that the dissent is citing the "research" in the student note to support the notion that Dorrance's alleged comments about consensual sexual behavior "humiliated some of the women because it portrayed them as being sexually promiscuous." *Post* at 49.

Notably, the dissent fails to cite testimony from any woman on the team who felt such humiliation due to her alleged portrayal as promiscuous. Further, even though Jennings conducted extensive discovery in this case, the record is devoid of such evidence. Indeed, the record evidence is to the contrary. *See* J.A. 321-23. Thus, notwithstanding the "sociological and theoretical research" cited in the dissent and the student note, it is accurate to state that Dorrance's comments and the comments of Jennings' teammates who engaged in these conversations hardly painted women in a sexually subservient, negative, or demeaning light.

The dissent's ultimate conclusion is that we "fail[] to confront the gravity of the facts advanced by the Jennings." *Post* at 47-48. We respectfully disagree. In accordance with Fourth Circuit precedent, we acknowledge that even if Dorrance's participation in conversations at practice with other players constitutes harassment, such second-hand harassment is less objectionable than harassment directed at the plaintiff. Further, it is the dissent that "fails to confront" (1) the undisputed fact that Jennings' evidence (beyond the alleged second-hand harassment) consists of *two* verbal comments directed at her over *two* years and (2) the legal consequences that flow from this lack of evidence. *See supra* at 20-22 (analyzing Fourth Circuit precedent); *see also Mendoza*, 195 F.3d at 1244-52 (surveying Title VII sexual harassment cases from other circuits).

V.

Jennings seeks to hold Dorrance and Palladino liable for sexual harassment under 42 U.S.C. 1983. Sexual harassment

violates the Fourteenth Amendment and is actionable under section 1983. *See Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994). The Title VII hostile work environment analytic framework applies to section 1983 sexual harassment claims. *Id.* at 529.

As mentioned, "to establish a Title VII claim for sexual harassment in the workplace, a female plaintiff must prove that the offending conduct (1) was unwelcome, (2) was based on her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer." *Ocheltree*, 335 F.3d at 331. Because Jennings has failed to raise a genuine issue of material fact as to the third element as to either Dorrance or Palladino, plaintiff's section 1983 claim fails. [*280]

VI.

Jennings contends that the district court erred in granting summary judgment on her claim brought under 42 U.S.C. § 1983 that Dorrance violated a "constitutional zone of privacy" by asking her about her sex life. (Appellant's Opening Br. 34 (citing *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).) In *Whalen*, the Court stated that its "cases sometime characterized as protecting 'privacy' have . . . involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen*, 429 U.S. at 599-600 (footnotes omitted). Although Jennings argued below that Dorrance violated both interests, on appeal Jennings proceeds only under the disclosure prong.

(Appellant's Opening Br. 34-36); *cf. Jennings*, 340 F. Supp. 2d at 676 (rejecting claims under either the independent decision-making or informational privacy lines of cases).

Even if we accept plaintiff's contention that the Supreme Court's "privacy" cases sometimes protect "avoiding disclosure of personal matters," *Whalen*, 429 U.S. at 600, plaintiff appears to concede that a forced disclosure is necessary under this theory. (*See* Appellant's Opening Br. 35.) Indeed, she principally relies on *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), a case that involved a police officer who was forced to disclose "information regarding personal sexual matters" and then not hired based in part on her prior sexual activities. *Id.* at 468; *accord Bloch v. Ribar*, 156 F.3d 673, 683-85 (6th Cir. 1998) (being forced to reveal information regarding sexual conduct may implicate the interest discussed in *Whalen* in avoiding disclosure of personal matters); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (same); *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) (compelling prisoners to answer questions from prison psychologists may implicate their right under *Whalen* to avoid disclosing personal matters).

Jennings' claim fails because she was not forced to disclose anything about her personal sexual conduct. In fact, she rebuffed Dorrance's December 1996 question and that ended the matter. Jennings, however, attempts to avoid the requirement of forced disclosure by arguing that she refused to answer Dorrance's question about her sex life and he then cut her from the team in retaliation for refusing to tell him about her sex life. (Appellant's Opening Br. 36 ("Jennings [*sic*] refusal to submit to Dorrance's questioning led to her

dismissal from the team."); Appellant's Reply Br. 21 ("Jennings' refusal to submit to this inquiry resulted in her removal from the team.").)

Despite Jennings' attempt to substitute "forced disclosure" with "retaliation for refusing to disclose," she cannot escape two fatal facts. No evidence of retaliation exists, and too much time elapsed between the December 1996 meeting where Dorrance asked the question and the May 1998 meeting where Dorrance cut Jennings from the team for any rational jury to find that Dorrance cut Jennings from the team because she refused to answer his question. *See Causey v. Balog,* 162 F.3d 795, 803 (4th Cir. 1998) (holding that "thirteen month interval between the charge and termination is too long to establish causation [under Title VII] absent other evidence of retaliation"). As such, the district court properly entered summary judgment on this claim.

VII.

Jennings also brought a section 1983 claim against University administrators [*281] Swofford, Baddour, Ehringhaus, Miller, and the Hooker estate for failing to adequately supervise Dorrance and Palladino and therefore facilitating the violation of her statutory and constitutional rights. "Supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates." *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir. 1994). To establish such a claim under section 1983, the plaintiff must show:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices []; and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Baynard, 268 F.3d at 235 (quoting *Shaw*, 13 F.3d at 799).

If no "injury" has taken place, then the plaintiff cannot satisfy element three and the claim fails. Because neither Dorrance nor Palladino violated section 1983, the supervisory defendants cannot be held liable for failing to stop a non-violation. *See Klemencic*, 263 F.3d at 511.

VIII.

Jennings sued Dorrance for invasion of privacy under North Carolina law. She relies on the December 1996 question in the hotel room and the "Trim'n" reference at practice. The district court granted summary judgment to Dorrance on plaintiff's North Carolina invasion of privacy claim. *See Jennings*, 340 F. Supp. 2d at 678.

Although the Supreme Court of North Carolina has not yet examined the contours of this specific privacy tort, the North Carolina Court of Appeals has recognized the tort of invasion of privacy by "intrusion into the seclusion, solitude,

or private affairs of another." *Miller v. Brooks*, 123 N.C. App. 20, 472 S.E.2d 350, 353 (N.C. Ct. App. 1996) (reversing summary judgment for defendant on claim when separated wife had private detective secretly install a video camera in plaintiff-husband's bedroom and routinely sorted through and discarded some of plaintiff-husband's mail without his permission or knowledge); *see Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76, 90 (N.C. Ct. App. 2002) (reversing dismissal of invasion of privacy tort claim when defendant viewed and released information from plaintiff's state personnel file without permission). The North Carolina Court of Appeals defined the tort as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Miller, 472 S.E.2d at 354 (quotations and citation omitted).

"Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 588 S.E.2d 20, 27 (N.C. Ct. App. 2003) (upholding summary judgment for defendant when all of the information at issue was public information). In addition, the conduct at issue "must be so egregious as to be 'highly offensive to a reasonable person.'" *Id.* at 28 (quoting *Smith v. Jack Eckerd Corp.*, 101 N.C. App. 566, 400 S.E.2d 99, 100 (N.C. Ct. App. 1991)). It is not enough [*282] that the conduct offended

the plaintiff. *Smith,* 400 S.E.2d at 100 (affirming summary judgment for defendant store where store alarm sounded as plaintiff left the store, the store employee then searched plaintiff and her children with a scanner and searched under plaintiff's children's coats).

In this case, Jennings testified that she refused to answer Dorrance's question in the hotel room about her sex life and that Dorrance then moved to a different topic. Likewise, Jennings ignored Dorrance's "Trim'n" comment at practice. No private information was disclosed in either incident. *Cf. Toomer,* 574 S.E.2d at 90; Miller, 472 S.E.2d at 353. Further, Dorrance's question in the hotel and his comment at practice do not rise to the level of egregious conduct required under North Carolina law. *See Smith,* 400 S.E.2d at 100. Accordingly, the district court properly granted summary judgment to Dorrance on this claim.

IX.

Jennings moved to strike the defendants' amended answer and for an entry of default judgment because Dorrance allegedly made statements during his deposition that contradicted the defendants' amended answer. Specifically, in the amended answer Dorrance denied making "lewd and degrading comments regarding other team members in the presence of plaintiffs" (First Amended Complaint P19), but in his deposition, he testified that he could not recall "whether [he] discussed sexual activity among the team players." JA 848. The district court denied the motion to strike, finding that the two responses were "not clearly factually inconsistent" and that there was no evidence of bad faith. *Jennings,* 340 F. Supp. 2d at 672.

Jennings also moved to strike exhibits C through H that were attached to Dorrance's affidavit. Jennings contends that these exhibits were not properly authenticated and constitute inadmissible hearsay. The district court concluded that these exhibits were properly authenticated and qualified as records of regularly conducted activity under Federal Rule of Evidence 803(6) and were therefore admissible. *See Jennings*, 340 F. Supp. 2d at 672-73.

Jennings appeals the denial of both of these motions. We review each decision under an abuse of discretion standard. *See Supermkt. of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 126 (4th Cir. 1995); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 809 (4th Cir. 1988) (*per curiam*). Further, the district court's determination that there was no evidence of bad faith and its factual findings underlying its evidentiary rulings are reviewed under a "clear error" standard. *See Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996); *Hyatt v. Shalala*, 6 F.3d 250, 255 (4th Cir. 1993).

We have reviewed the record and the district court's reasoning. *See Jennings*, 340 F. Supp. 2d at 671-73. The district court did not abuse its discretion in refusing to strike the amended answer and enter a default judgment and did not commit clear error in declining to find bad faith. Likewise, even assuming the district court abused its discretion in refusing to strike exhibits C through H to the Dorrance affidavit, those exhibits had no bearing on whether Jennings had demonstrated the existence of a genuine issue of material fact on any of her claims.

X.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

DISSENT BY: MICHAEL

DISSENT

[*283] MICHAEL, Circuit Judge, dissenting:
Melissa Jennings's account must be taken as true: when she was seventeen and a member of the women's soccer team at the University of North Carolina at Chapel Hill (UNC or University), her forty-five-year-old male coach, Anson Dorrance, persistently and openly discussed and pried into the sex lives of his players, using what he learned to degrade and humiliate them. The University, according to Jennings's evidence, knew about Dorrance's conduct and failed to take prompt action to stop it. These facts, as amplified in the summary judgment record, entitle Jennings to a trial on her Title IX hostile environment claim against UNC and her § 1983 claim against Dorrance and Susan Ehringhaus, an official at UNC. *See* Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688; 42 U.S.C. § 1983. The majority affirm sthe district court's grant of summary judgment to the defendants on the ground that Dorrance's conduct was not sufficiently severe or pervasive to create an environment hostile to women. But a thorough examination of the facts, viewed in the light most favorable to Jennings, reveals that the majority has failed to appreciate the force of her case. Because Jennings has proffered facts

showing that the soccer team environment was persistently degrading and humiliating to her and to other young women, she is entitled to a trial. I therefore respectfully dissent.

I.

A.

Jennings was a goalkeeper for the UNC women's soccer team from the beginning of her freshman year, August 1996, until she was cut from the team at the end of her sophomore year, May 1998. As a recruited walk-on, she had been personally recruited by head coach Dorrance but had not been recommended for a scholarship. By all accounts, UNC has long had the best women's soccer program in the country. Dorrance is the most successful women's soccer coach in college history, having won eighteen of the twenty-three national championship games held through 2003. He has also coached the U.S. Women's National Team. According to Jennings, many girls would "cut off their right arm to be at [UNC]" and play for Dorrance. J.A. 1227.

Jennings reports that Dorrance made sexual comments and inquiries "on a regular basis" while she was a member of the team, from the fall of 1996 through the spring of 1998. J.A. 1585. According to Debbie Keller, Jennings's teammate, Dorrance would make inappropriate sexual comments to players "anytime the team was together," whether "on a plane, in a car, or on a bus, in a hotel, at practice, out of town, at events. " J.A. 1066. Amy Steelman, another teammate, said that a "typical Monday afternoon" included Dorrance "prying into our sex lives" and sexual "exploits." J.A. 1452.

***Jennings*, 444 F.3d 255 (4th Cir. 2006), CONT'D . . .**

While Jennings was a team member, most of Dorrance's sexual talk occurred during "team time, " when the players stretched and warmed up before practice. Dorrance joined "team time" once or twice a week and frequently participated in and encouraged the players' discussions about their sexual activities. Often using the word "fuck," he asked lewd questions and made crude comments. Nearly every day or every other day, he inquired of one player in front of the entire team, "Who [her] fuck of the minute is, fuck of the hour is, fuck of the week [is]," whether there was a "guy [she] hadn't fucked yet," and whether she "got the guys' names as they came to the door or whether she just took a number." J.A. 1236-38, [*284] 1261-62. He asked another player if she was "going to have sex with the entire lacrosse team," and he advised another, "You just have to keep your knees together . . . you can't make it so easy for them." J.A. 1127. Of another player, Dorrance inquired whether she was going to have a "shag fest" when her boyfriend visited and whether she "was going to fuck him and leave him." J.A. 1238, 1248. To still another, he asked about the size of her boyfriend's genitalia.

Dorrance told one player, Keller, that he would "die to be a fly on the wall" the first time that her roommate, a fellow player and born-again Christian, had sex. J.A. 1068. (Keller relayed this comment to some players, including Jennings, to indicate how stunned and appalled she was by it.) Once during a water break at practice, within earshot of Jennings, Dorrance told a trainer that he fantasized about having "an Asian threesome" with his Asian players. J.A. 1229, 1271, 1284-85.

During practice Dorrance regularly commented on players' "nice legs" and "nice racks" and about their "breasts bouncing." J.A. 393, 1229, 1233, 1236. He described how their "asses [looked] in spandex" and how unbalanced or "top heavy" some players were. J.A. 1073, 1229, 1236. He regularly remarked on one player's "dimples and . . . cuteness," J.A. 1271, called one player "fat ass," J.A. 1276, and called another "Chuck" because he suspected that she was a lesbian (her name was Charlotte), J.A. 1228, 1281-82.

Dorrance showed overt affection for one player, Keller, in front of the entire team. He frequently brushed her forehead, hugged her, rubbed her back, whispered in her ear, and touched her stomach. According to Jennings, during one weight-lifting session when the players were lightly clad, Dorrance called Keller over and walked her outside "towards the stadium, putting his arms around her." J.A. 1432. Steelman likewise observed Dorrance paying "inordinate attention" to Keller, "putting his arm around her shoulder," "dangling his hand in front of her chest," and touching her hair. J.A. 1452. Keller was plainly troubled by Dorrance's affection. Steelman observed Keller's "body language indicating strong discomfort . . . giving a grimaced look." J.A. 1452-53. Keller herself confirmed that Dorrance's constant touching "made [her] skin crawl" and made her "feel dirty." J.A. 1145. She did not protest, however, because she feared that Dorrance would retaliate by reducing or even eliminating her playing time. [1]

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[1] The majority points out that Jennings and Keller were teammates for only one year, *ante* at 30, and that Steelman joined the team a year before Jennings did, *id.* at 31. These timing circumstances, the

(continued...)

With his persistent comments and conduct, Dorrance created a "sexually charged environment" that made Jennings feel "uncomfortable, filthy and humiliated." J.A. 1242, 1250, 1452. Dorrance's comments "all tied together" from girl to girl to girl, putting Jennings in constant fear that she would be his next target. J.A. 1250. As much as she tried to stay out of Dorrance's "radar," J.A. 1242, Jennings [*285] could not escape the anxiety and discomfort that she felt and observed in others. She witnessed other players become angry, disgusted, and humiliated by Dorrance's sexual questions and remarks during warm-up or at team gatherings. A few players reacted tearfully, saying, "I can't believe him. Why would he say that?", or "I can't believe he would say that. I never do that." J.A. 1239-41, 1269-71. One player often left practice in tears. Nonetheless, many players feared complaining directly to Dorrance because, as their coach, he controlled positions, playing time, and scholarship eligibility. As Jennings explained, many players feared that "if they gave any sort of opposition . . . [their] playing time [would be] gone, their career [would be] gone." J.A. 1227.

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1 (...continued)
majority argues, render irrelevant any parts of Keller's and Steelman's testimony that recount Dorrance's sexual harassment during the period leading up to August 1996, when Jennings joined the team. This testimony, however, is relevant proof of the (sex-based) hostile environment into which Jennings was introduced. *See Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) (stating that the factfinder may consider "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs"). In any event, much of Jennings's evidence concerns harassment that occurred in her presence during her two years on the team.

By this, she meant not just any soccer career, but a career with the nation's top collegiate team.

Jennings "dodged [Dorrance's] bullet a couple times." J.A. 1251-52. But not every time. Dorrance twice targeted Jennings with sexual questions and innuendos. At a tournament in California in fall 1996, at the end of Jennings's freshman season, Dorrance held one-on-one meetings with players in his hotel room to assess their season performance (conditioning, skills, contribution to team chemistry, and academic status). Dorrance told Jennings that she was in danger of losing her eligibility to play soccer if her grades did not improve. In the midst of this discussion, Dorrance asked Jennings, "Who are you fucking?" J.A. 1326, 1330. Jennings replied that it was "none of his God damn business" what she did off field. J.A. 1325. As Jennings described the scene, "I was 17 when he asked me ["Who are you fucking?"] in a dark hotel room, knee-to-knee, bed not made, sitting at one of those tiny tables." J.A. 1230. She felt acutely uncomfortable.

Dorrance's second sexual comment to Jennings came during a warm-up session in her sophomore year (1997-98). Certain players and Dorrance were inquiring about and discussing one player's recent weekend (called a "shag fest" by Dorrance, J.A. 1248), which ended with a young man crawling out of her window. Jennings had spent that same weekend visiting her boyfriend off campus. Inevitably, as the crude discussion progressed, one player piped up (using Jennings's nickname), "Well, what about Trim'n?" J.A. 1246. Dorrance immediately "chimed in," saying "Yes, what about Trim'n?" J.A. 1248, 1252. Dorrance thereby encouraged the

interrogation about personal sexual activity to "slide over" to Jennings. J.A. 1249. She felt humiliated and did not respond.

B.

In the fall of 1996, during her freshman year, Jennings notified the University about the sexually hostile environment that Dorrance had created inside the women's soccer program. Sometime between September and November of that year, Jennings met with Susan Ehringhaus, the University's General Counsel and Assistant to the Chancellor, to discuss her complaints about Dorrance. Jennings chose to meet with Ehringhaus because Ehringhaus was a woman and "had presented herself as being okay and [having] open doors to talk." J.A. 1338. Jennings "gave [Ehringhaus] a [complete] run-down" of Dorrance's sexual comments at practice. J.A. 1343. She reported that his conduct rendered the women's soccer environment "humiliating [and] uncomfortable" for her. J.A. 1342. Ehringhaus dismissed these concerns, suggesting that Jennings simply "work it out" with Dorrance. J.A. 1341, 1343. As Jennings puts it, "[Ehringhaus] basically just gave me the sugar coating, [saying]'[Dorrance] is a great guy. I've [*286] known him for a long time,' [and with that, she] shoved me out the door." J.A. 1342.

Dorrance cut Jennings from the team during exams at the end of her sophomore year (May 1998), citing her inadequate fitness. Over the next several days, Jennings's parents telephoned and wrote the Chancellor's office to complain about Dorrance's questions and comments about players' sexual activities. In due course, Richard Baddour, the Director of Athletics, conducted an administrative review

pursuant to UNC's sexual harassment policy. Ehringhaus, Baddour, and another University official met with Jennings, her father, and Dorrance around May 26, 1998, when the Jenningses reiterated their complaints about Dorrance's participation in and encouragement of the players' conversations about sex. Dorrance admitted participating in group discussions about players' sexual activities, but claimed that his comments were only "of a jesting or teasing nature." J.A. 1404, 1531. He later admitted in deposition that it would be "entirely inappropriate" for him as a male coach to discuss with any woman player her sexual activity unless she herself raised the topic to seek his advice and "she was doing something that was hurting her." J.A. 838-39.

The administrative review ended with athletic director Baddour sending a letter of apology to Mr. Jennings and a brief, mild letter of reprimand to Dorrance. On June 9, 1998, Baddour wrote to Mr. Jennings apologizing for Dorrance's "inappropriate . . . involvement in [sexual] discussions" with his team members. J.A. 1531. Baddour assured Mr. Jennings that "appropriate interventions had occurred with Coach Dorrance to address these unacceptable conversations." *Id.* Dorrance indicated his own apology by counter-signing the letter. One day later, Baddour wrote to Dorrance declaring it "inappropriate for [Dorrance] to have conversations with members of [the] team (individually or in any size group) regarding their sexual activity." J.A. 1533.

C.

In August 1998, at the start of Jennings's third year at UNC, Jennings and Keller brought a single action against the University and several individual defendants, including

Dorrance and Ehringhaus, asserting (among others) claims under Title IX and § 1983. After the lawsuit was filed, Jennings was threatened and harassed on the UNC campus. One former teammate cursed at and physically threatened her with a lacrosse stick, an incident that she reported to the UNC Public Safety Office. Every night she received harassing and threatening phone calls until the "wee hours" from anonymous university numbers. J.A. 1267. University officials warned Jennings that they could not guarantee her safety on campus and encouraged her to take comparable classes at another university, promising that her credits could be transferred to UNC. Jennings completed her third year at UNC but transferred to Northern Illinois University for her final year. Keller settled her claims and took a dismissal with prejudice. Jennings's case proceeded to the entry of summary judgment in favor of the defendants. That judgment should be vacated to allow Jennings's Title IX and § 1983 claims to proceed.

II.

I will first explain why Jennings is entitled to a jury trial on her Title IX claim against UNC. Title IX prohibits sex-based discrimination by educational institutions that receive federal funds. The statute provides that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected [*287] to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX, which is patterned on Title VII of the Civil Rights Act of 1964, prohibits sexual harassment that creates a hostile educational environment. *Hayut v. State Univ. of New York*, 352 F.3d 733, 750 (2d Cir. 2003). To establish such a

claim, the plaintiff must prove that (1) she was a student at an educational institution receiving federal funds, (2) who was subjected to harassment (3) based on her sex; (4) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) educational environment; and (5) there is a basis for imputing liability to the institution. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002).

A.

The majority concentrates on the hostile environment element and erroneously concludes that Jennings has not proffered adequate facts to raise a triable issue as to whether Dorrance's discussions (in team settings) about the sexual activities of the young women on his soccer team were sufficiently severe or pervasive to create a hostile environment. I recognize, of course, that the "severe or pervasive" element has an objective component: the environment must be regarded as hostile to a reasonable person in the victim's position. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333 (4th Cir. 2003) (*en banc*). In addition, Title IX, like Title VII, is not a general civility code. *See ante* at 19. Nevertheless, Title IX protects a student from an educational environment that is permeated with sex-based degradation, insult, ridicule, and intimidation. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993); *Ocheltree*, 335 F.3d at 333.

The majority dutifully catalogs a number of Title VII and Title IX cases analyzing whether conduct is sufficiently severe or pervasive to create an objectively hostile

environment. *See ante* at 16-24. The conduct analyzed in these cases runs the gamut from merely unpleasant comments to physical touching and threats of rape. *Compare Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 768-73 (4th Cir. 1997) (affirming summary judgment in employer's favor on ground that employer's statements to plaintiff, including that "we've made every female in this office cry like a baby" and that she should "go home and fetch [her] husband's slippers like a good little wife," constituted "mere unpleasantness" not actionable under Title VII), *with Anderson v. G.D.C., Inc.*, 281 F.3d 452, 456-59 (4th Cir. 2002) (reversing summary judgment on ground that plaintiff's allegations that supervisor "barraged" her with daily comments about her breasts and buttocks, threatened to rape her, and pressed his penis against her buttocks were "unquestionably sufficient" to submit to a jury). These cases simply confirm that hostile environment analysis "is not, and cannot be [amenable to] a mathematically precise test." *Harris*, 510 U.S. at 22. Rather, what differentiates mere unpleasantness from actionable (severe or pervasive) harassment depends largely on factual context, that is, the "constellation of surrounding circumstances, expectations, and relationships . . . including, but not limited to, the ages of the harasser and the victim." *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 651, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)). The "severe or pervasive" inquiry thus examines the "totality of the circumstances," including the frequency and severity of the conduct, its [*288] impact in terms of humiliation or threat, and its degree of interference with the victim's educational pursuits. *See Harris*, 510 U.S. at 23.

B.

The facts proffered by Jennings, when viewed in the light most favorable to her, raise a genuine issue of material fact as to whether Dorrance's conduct was sufficiently severe or pervasive to create a sexually hostile environment. The majority, in concluding otherwise, fails to heed the basic rule for reviewing a summary judgment: "The evidence of the non-movant [here, Jennings] is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Moreover, the majority attempts to brush aside what happened as mere unpleasantness and vulgarity. Jennings, according to the majority, was simply a bystander to her fellow teammates' sexual and social banter, and Dorrance's participation -- even if it constituted harassment -- was only "second-hand harassment . . . [that is] less objectionable." *Ante* at 23. *But see Jackson v. Quanex Corp.*, 191 F.3d 647, 660 (6th Cir. 1999) ("Offensive comments need not be directed at a plaintiff in order to constitute conduct violating Title VII."). The majority fails to confront the gravity of the facts advanced by Jennings. She was not a mere bystander who was unaffected by Dorrance's comments. Rather, she was caught in a hostile environment that was demeaning to young women. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) (noting that it is important to consider evidence of *general atmosphere* when evaluating hostile environment claim); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 n.2 (11th Cir. 1982) ("The fact that many of the epithets were not directed at [plaintiff] is not determinative. The offensive language often was used in his presence" and created an environment "heavily charged"

with discrimination.) (internal quotation marks and citation omitted). Dorrance's sex-based verbal abuse permeated the atmosphere and at times homed in on Jennings. *See Harris*, 510 U.S. at 21-22 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)).

Dorrance let Jennings know at the beginning of her freshman year that she was within his sights. He singled her out in front of the entire team, labeling her as "rich" and ordering her to withdraw$ 400 from her bank account to pay for a team supply of Gatorade. J.A. 1301-02. She was in perpetual fear that Dorrance would inevitably direct his "filthy comments" at her, as he shifted his focus from one girl to the next to the next. J.A. 1242-43,1250. His comments and questions "all tied together," J.A. 1250, as he pried into players' sexual activities and exploits and made graphic remarks about their "racks" and "asses in spandex," J.A. 1229. It was as if his comments were a soccer ball, passed from one player to the next, with Jennings the goalkeeper constantly bracing to block a shot that would surely come at her.

Jennings tried hard to "stay out of [Dorrance's] radar" and thereby avoid his probing and indecent comments. J.A. 1242. She avoided the young women who were Dorrance's "main targets" and refused to respond when he inquired about her weekend with her boyfriend while he (Dorrance) was discussing another player's weekend "shag fest." J.A. 1250. But she could not avoid this environment altogether without skipping warm-up, practice, and other team gatherings. She could not dictate which players Dorrance targeted and when. Jennings was always within Dorrance's [*289] range and reasonably feared being his next target, a

fear that materialized when he asked "Who are you fucking?," J.A. 1330, and "What about Trim'n?," J.A. 1252.

Moreover, Dorrance's remarks were not made any less offensive because they related to consensual sexual activities. The majority concludes that the remarks "hardly painted women in a sexually subservient, negative, or demeaning light." *Ante* at 24. Comments can be sexually hostile and abusive regardless of whether they portray women as sexual prey or as sexual predators, as sexually subservient or as sexually dominant. Asking a player who her "fuck-of-the-hour" is, or whether she knows the names of her many conquests or just takes numbers, is disrespectful, degrading, and abusive -- especially coming from a much older and more powerful male coach. J.A. 1223. These questions, although focused on consensual sex, nonetheless humiliated some of the women because it portrayed them as being sexually promiscuous. Indeed, on some (albeit rare) occasions, Dorrance would go so far as to call a player a "slut" in front of the team. J.A. 1251. While not always portraying women in a "sexually subservient . . . light," *ante* at 23-24, Dorrance's remarks were no less degrading because of that. *See generally* Annmarie Pinarski, *When Coaches "Cross the Line": Hostile Athletic Environment Sexual Harassment*, 52 Rutgers L. Rev. 911, 926-31 (2000) (surveying sociological and theoretical research). A reasonable jury could find that Dorrance's constant comments and questions about consensual sex contributed to a hostile environment.

Jennings was not alone in finding Dorrance's remarks offensive, although the majority contends otherwise. While some teammates were "wide open" about their personal lives

and sexual activities, others were less vocal and more reserved, preferring total privacy in these areas. J.A. 1053-54. Steelman was "shocked" that Dorrance encouraged and instigated the discussions about sex; she felt "very uncomfortable with his sexually charged environment," and she "would frequently [go] home crying as a result." J.A. 1452. Dorrance's comments visibly upset and angered other players as well. One, who was constantly portrayed by Dorrance as sexually promiscuous, would say through tears, "What the hell is [Dorrance] doing saying that?" and "I can't believe he would say that. I never do that." J.A. 1239. Still another cried because Dorrance focused on her breasts (her "rack," as he put it), saying that she "couldn't believe him." J.A. 1270. [2] Evidence that other players shared Jennings's humiliation and discomfort indicates that she was objectively reasonable in finding Dorrance's comments offensive and humiliating. *Cf. Hayut*, 352 F.3d at 747 (characterizing reactions of plaintiff's peers to conduct directed at plaintiff as "significant to the mandated objective analysis" of whether

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[2] The majority argues that Jennings is simply offering "opinion testimony" when she discusses the preceding two players, identified by the majority as A.F. and S.D., who were upset by Dorrance's comments. *Ante* at 31. Jennings's testimony, however, includes accounts of these players' physical reactions. One "didn't look happy" and cried when she discussed Dorrance's repeated claims that she was promiscuous. J.A. 1241-42. The other had a "disgusted look . . . an upset look on her face" when she expressed incredulity at Dorrance's remarks about the size of her breasts. J.A. 1271. Although these two players have since signed affidavits saying that Dorrance never made unwelcome or offensive comments to them, there is nevertheless a material factual issue about their reactions at the time in question.

conduct was sufficiently severe to be actionable under Title IX).

[*290] Moreover, just because some of the young women willingly and openly discussed their sexual activities among *themselves* does not mean they were comfortable having those discussions with *Dorrance*. Contrary to the majority's suggestion, there is nothing "telling" about the fact that Jennings "does not appear to object to some of her teammates talking about their sex lives." *Ante* at 23. What is telling is that she objects to *Dorrance's* constant and open discussion about the players' sex lives. Dorrance was not simply one man outnumbered by twenty-six women. He was a forty-five year-old man probing into the sexual activities of young women, some of whom, like Jennings, were as young as seventeen. As the coach, he controlled everything: team membership, scholarship eligibility, playing position, and playing time. He was in fact more than a regular college coach; he was and still is the most successful women's soccer coach in U.S. history and a former national team coach. As such, he exercised tremendous power over his players' soccer careers at UNC and beyond.

The players were acutely aware of Dorrance's power and feared his punishment should they complain. Even though some players felt discomfort, humiliation, or disgust because of Dorrance's conduct, they were afraid to object. As Jennings put it, "How do you say anything [to stop him]." J.A. 1290. "If you are submissive, you are fine," J.A. 1227, but if you are not, "your career goes -- you . . . lose your playing time. You are stuck between a rock and a hard place." J.A. 1290. According to Keller, Dorrance's affectionate touching and questioning about sex "made [her]

skin crawl" and made her "feel dirty," J.A. 1145, yet she "didn't want to tick him off to a point . . . where he would take it out on [her] by not playing [her]." J.A. 1120. Keller thus "felt the pressure" to give in to some degree and answer some of Dorrance's vulgar questions. J.A. 1120.

The unequal power relationship between Dorrance and his players, and his ability to punish players who were not submissive, serve to make his comments about sex all the more severe and hostile. *See Davis,* 526 U.S. at 653 (noting that relationship between harasser and victim necessarily affects whether conduct creates a hostile environment in violation of *Title IX); Crandell v. New York Coll. of Med., 87* F. Supp. 2d 304, 319 (S.D.N.Y. 2000) (denying summary judgment motion in part because "unequal power relationship" between harasser and victim could support a jury finding of sexually hostile environment). The majority discounts this power differential by suggesting that the more encompassing, "more informal [or] casual" relationship between a college coach and his athletes may serve to prevent the coach's profanity, touching, and personal questions from "crossing the line separating 'the merely vulgar and mildly offensive' [and] 'the deeply offensive and sexually harassing.'" *Ante* at 26, 27; *see also ante* at 26 (stating that "we are not examining the atmosphere in a typical university classroom with a typical university instructor or even the atmosphere in a typical workplace").

It is true that college coaches spend long hours (even time on the road and in hotels) with their athletes, become involved in matters personal to the athletes from diet to restrictions on social life, engage in "hands-on" demonstrations in practice, massage stiff or injured muscles,

and celebrate by exchanging high-fives and hugs. *See ante* at 26. Indeed, coaches and athletes can spend over a third of their waking hours together, including one-on-one contact and hours of unstructured "downtime" that fosters familiarity and close relationships. Nancy Hogshead-Makar & [*291] Sheldon Elliot Steinbach, *Intercollegiate Athletics' Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 Marq. Sports L. Rev. 173, 176-77 (2003). This more informal atmosphere can, as the majority suggests, serve to normalize conduct, such as cursing or touching, that would be inappropriate in the more formal setting of the classroom or office. On the other hand, the same informal sports setting, coupled with the coach's intensely personal yet authoritative relationship with his athletes, may enhance the potential for sexual harassment. *See, e.g., id.* (noting that a coach's "special authority" over athletes and frequent one-on-one contact "amplify the potential for harassment").

Jennings proffers facts that, if believed, show that Dorrance took advantage of the informal atmosphere as well as his position of power to crossover from routine teasing into real sexual harassment. Dorrance developed an intensely close and controlling relationship with many of his athletes. Part of this control was knowing the intimate and even humiliating details of his players' lives. According to Jennings, Dorrance knew about his players' sexual relationships and "knew who does drugs . . . who has the drinking problems . . . who has the eating disorder. And if you don't support him, then he holds it over your head. [He] is very manipulative." J.A. 1223. He held himself out as a "father figure," encouraging his players to confide in him fully. J.A. 1325. Yet in return he asked questions of the sort

that fathers do not typically ask: "Who are you fucking?" or "Who is your fuck of the hour?" J.A. 1223, 1330. As Keller put it, "It's just kind of sick [that] . . . someone that you think is more of a father figure to you [is] telling you they want to watch your friend have sex." J.A. 1069. Dorrance would gain his players' trust only to exploit or betray it later, humiliating them one-on-one or in front of teammates.

In this sexually charged atmosphere, Dorrance's comment to a trainer that he wanted to have an "Asian threesome" with two Asian players was particularly troubling to Jennings. It revealed that Dorrance had more on his mind than simply teasing or jesting with his players. It confirmed that he saw at least some of them as sexual objects. The comment exacerbated Jennings's otherwise reasonable anxiety over whether and when she would be Dorrance's next target for a degrading question or comment.

Jennings's turn came during a fall 1996 tournament, when Dorrance met with her one-on-one in his dim hotel room, bed unmade, and asked her, "Who are you fucking?" As her coach, Dorrance was certainly free to inquire into Jennings's general social life and how she managed her time, especially because he was concerned about her grades. But this question had no legitimate place in the inquiry. Its aggressive tone, combined with the setting (alone in confined quarters) and the overall circumstances (Dorrance's pattern of sexually aggressive questioning and his power over his players) served to intensify an already hostile environment regarding matters of sex.

The majority suggests that Jennings's forceful reply relegated Dorrance's question to the benign "inappropriate"

category. It concludes that Jennings's response, "None of [your] God damn business," J.A. 1331, "undercuts the notion that [Dorrance's] age and power (as her coach)" put the question in the sexual harassment category. *Ante* at 25. Jennings's response did not equalize the power imbalance, however. Dorrance was still her older male coach, the one who controlled her team membership and playing time; Jennings [*292] was still his subordinate, "taken aback" by his intrusive question and feeling "very uncomfortable" and eager to end the inquiry. J.A. 1331. Her response indicated her indignation and discomfort. It did not neutralize Dorrance's offense or immunize his conduct. A rational jury could find that Dorrance's question constituted sexual harassment, particularly in light of his pattern of asking many of his players the same sort of question.

In sum, Jennings has proffered sufficient facts for a jury to find that Dorrance's conduct was sufficiently severe or pervasive to create a sexually hostile environment. First, at least once or twice a week when the soccer team was together, Dorrance would get involved in -- and encourage -- discussions about his players' sex lives. Second, Dorrance himself regularly made indecent and inappropriate comments. In front of the team he constantly asked certain players questions, such as: Who is your "fuck of the minute"? J.A. 1237. "[Are you] going to have sex with the entire lacrosse team?" J.A. 1127. Are you going to have a "shag fest" when your boyfriend visits? J.A. 1248. Are you "going to fuck him and leave him"? *Id.* Dorrance's constant and vulgar prying into his players' sexual activities made several of them uncomfortable, on occasion driving them to tears. Nonetheless, these players often felt pressured to answer his questions and endure his comments without

protest, fearing that any other course would provoke some form of retaliation from him. Third, Dorrance displayed overt affection for one player and told her that he would like to be a "fly on the wall" the first time her roommate (and teammate) had sex. J.A. 1069. He told a trainer (in a conversation overheard by Jennings) that he would like to have group sex with his two Asian players. Fourth, Dorrance manipulated his players' trust. He portrayed himself as a father figure, encouraging them to confide in him about all aspects of their lives. Yet he often misused personal information to degrade and humiliate a player in front of the entire team. Fifth, in light of this atmosphere Jennings had every reason to believe that she would become the target of Dorrance's inappropriate attention. When Jennings did get the question, "Who are you fucking?", it was still another piece of Dorrance's pattern of harassment. In short, there is easily a jury question here.

C.

Jennings either presents facts sufficient to establish or to raise a jury question on the other elements or sub-elements of her Title IX claim. First, it is undisputed that she was a student at UNC, an institution receiving federal funds. Second, Jennings proffers evidence that Dorrance's persistent subjection of the young women to talk about sexual matters (the discrimination or harassment) was based on their sex (done because they were women). Dorrance claimed to be the young women's "father away from home," J.A. 1329, yet exploited their trust by prying into their sex lives in team settings and using what he learned to demean them because of their sex. *See Ocheltree,* 335 F.3d at 331-33 (concluding that it was reasonable for jury to find that harassment was

"because of sex" because conduct was "intended to provoke [plaintiff's] reaction as a woman," that is, to make her uncomfortable and self-conscious because of her sex). Third, Jennings testifies that Dorrance's conduct caused her severe discomfort and emotional distress that in turn caused her grades to suffer and had a negative impact on her participation in the women's soccer program. This testimony, when combined with the evidence of her substandard grade point average, creates a triable issue of fact as to whether Dorrance's conduct unreasonably [*293] interfered with her educational progress and soccer participation. *See, e.g., Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 76 (2d Cir. 2001) (finding that plaintiff's testimony that "it [was] almost impossible for [her] to do [her] work without getting upset" created triable issue of fact regarding unreasonable interference).

Fourth, Jennings provides a basis for imputing liability to UNC for Dorrance's conduct. She proffers evidence that the school had actual notice of the discrimination and made an inadequate response. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998). In particular, Jennings's facts show that University officials with authority to address the discrimination and to institute corrective measures had actual knowledge of Dorrance's misconduct and acted with deliberate indifference toward it, effectively causing the discrimination. *See Baynard v. Malone*, 268 F.3d 228, 237 (4th Cir. 2001) (citing *Gebser*, 524 U.S. at 290)). A reasonable jury could conclude that Ehringhaus, the University's highest-ranking lawyer and an official responsible for fielding sexual harassment complaints, received actual notice of Dorrance's misconduct during her

fall 1996 meeting with Jennings. Further, a jury could find that Ehringhaus acted with deliberate indifference by insisting that Dorrance was a "great guy" and then "shoving [Jennings] out the door." J.A. 1342. Ehringhaus's only response -- suggesting that Jennings "work it out" with Dorrance -- was patently inadequate. J.A. 1341. Jennings chose to meet with Ehringhaus precisely because she did not feel comfortable talking with Dorrance about his harassment. Indeed, the University's sexual harassment policy encourages a student to "resolve the matter with the administrative official most directly concerned, *excluding* the person accused of sexual harassment." J.A. 924 (emphasis added). Pushing Jennings back toward Dorrance thus appears "clearly unreasonable in light of the known circumstances," which amounts to deliberate indifference. *Hayut*, 352 F.3d at 751 (citing *Davis*, 526 U.S. at 648) (internal quotation marks and additional citation omitted). The University's ultimate reprimand of Dorrance, which came roughly a year and one-half later, would also allow a rational jury to find deliberate indifference because the reprimand "only followed after a lengthy and unjustified delay." *Id.* (internal quotation marks and citation omitted).

Jennings has proffered sufficient facts to meet each element of her Title IX claim against the University. This claim should therefore survive summary judgment.

III.

Jennings has triable § 1983 claims against Dorrance and Ehringhaus premised on her Fourteenth Amendment equal protection right to be free from sexual harassment in educational settings. *See Hayut*, 352 F.3d at 743-44. Here, as

to Dorrance, Jennings must show that his harassment was "because of sex" and was sufficiently severe or pervasive to interfere unreasonably with her educational progress or activities. *See, e.g., Beardsley v. Webb,* 30 F.3d 524, 527-29 (4th Cir. 1994); *Hayut,* 352 F.3d at 743-49. Jennings satisfies these requirements for the reasons mentioned in my discussion of her Title IX claim. To make out her § 1983 claim, Jennings must also show that Dorrance was acting "under color of law" at the time that he harassed his women soccer players. *Holland v. Rimmer,* 25 F.3d 1251, 1256 (4th Cir. 1994). "'State employment is generally sufficient to render the defendant a state actor,'" and a defendant in a *§ 1983* suit necessarily "acts under color of [*294] state law when he abuses the position given to him by the State." *West v. Atkins,* 487 U.S. 42, 49-50, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (quoting *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 936 n.18, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)). As a coach employed at a state university, Dorrance enjoyed great authority over his student athletes with respect to team membership, scholarship eligibility, and playing time. If he misused this authority, he necessarily acted under color of law for purposes of § 1983. *See, e.g., Hayut,* 352 F.3d at 744 (citing cases). For these reasons, Jennings's 1983 claim against Dorrance for sexual harassment should survive summary judgment.

Jennings's related § 1983 claim against Ehringhaus should likewise go forward because Jennings proffers evidence that Ehringhaus, as an administrative official with authority to take action against Dorrance, failed to act and thereby tacitly authorized Dorrance's sexual harassment. *See Baynard,* 268 F.3d at 235. More specifically, Jennings's evidence would allow a jury to find that Ehringhaus had

actual knowledge of Dorrance's misconduct; that her response was "so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices"; and that there exists "an affirmative causal link" between Ehringhaus's inactionand Jennings's constitutional injury. *Id.* (citing *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994)). Ehringhaus is therefore not entitled to summary judgment on Jennings's § 1983 claim against her for supervisory liability.

Dorrance and Ehringhaus argue that they are entitled to qualified immunity on the § 1983 claim. Because the district court did not address this issue in its summary judgment ruling, I would decline to consider it on appeal and would instead allow the district court to decide it in the first instance on remand. *See Brown v. United States*, 851 F.2d 615, 620 (3d Cir. 1988) ("Although it is within our power to do so, it would be inappropriate for us to decide this [qualified immunity] question on appeal, even if the record provided a sufficient basis for its resolution," because the district court had not yet addressed or ruled upon it.).

IV.

Jennings's case opposing summary judgment is made much easier because Dorrance does not deny all wrongdoing. Dorrance and the University admit that he participated in group discussions with women's soccer team members about their sexual activities. While Dorrance claims that he was only teasing or jesting, both he and the University admit that his actions were "altogether inappropriate" and "unacceptable." J.A. 1531. Dorrance and the University apologized to Jennings, and the University

warned Dorrance that it was "inappropriate for [him] to have conversations with members of [his] team (individually or in any size group) regarding their sexual activity." J.A. 1533. To these damning admissions, Jennings adds evidence that Dorrance frequently participated in discussions with his team about sex, that his comments and questions were graphic, indecent, and probing, and that she and several of her teammates felt humiliated and degraded. The University knew what Dorrance was doing and failed to take prompt action to stop it. Jennings has therefore proffered sufficient facts to demonstrate that there is a genuine need for a trial on her Title IX case against the University and her § 1983 claim against [*295] Dorrance and Ehringhaus. [3] I respectfully dissent for these reasons.

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[3] I agree with the majority's decision to affirm the grant of summary judgment in favor of the remaining defendants and in favor of Dorrance on Jennings's common law claim for invasion of privacy.

MELISSA JENNINGS, Plaintiff,

v.

UNIVERSITY OF NORTH CAROLINA at CHAPEL HILL, *et al.*, Defendant.

1:99CV400

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

340 F. Supp. 2d 666

October 27, 2004, Decided
October 27, 2004, Filed

OPINION BY: N. Carlton Tilley

OPINION

[*668] MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is before the court on the following motions: Defendants' Motion for Summary Judgment [Doc. # 115]; Plaintiff's Motion to Strike Amended Answer by Defendants and for Default Judgment [Doc. # 137]; and Plaintiff's Motion to Strike Exhibits C through H to the Affidavit of Anson Dorrance [Doc. # 142]. For the reasons set forth below, both of Plaintiff's Motions to Strike will be DENIED and Defendants' Motion for Summary Judgment will be GRANTED.

I.

The facts of this case viewed in the light most favorable to the Plaintiff are as follows.[1] The sole remaining Plaintiff[2] in this case, Melissa Jennings, was a member of the University of North Carolina at Chapel Hill ("UNC") women's intercollegiate soccer team ("the team") from August 1996 until she was dismissed from the team in May 1998. During this time, Defendant Anson Dorrance was the team's head coach and Defendant William Palladino was an assistant coach. Also at that time, the following defendants were employed by UNC: Michael Hooker, as Chancellor;[3] Susan Ehringhaus, as Assistant to the Chancellor and Senior University Counsel; John Swofford, as Director of Athletics; Richard Baddour, as Director of Athletics;[4] and Clara Elizabeth [*669] ("Beth") Miller, as Senior Associate Director of Athletics. All of these defendants are sued in their individual capacities. The University is also a defendant in this action.

Ms. Jennings was recruited by Mr. Dorrance to join the UNC women's soccer team as a goal keeper. (Jennings Dep. at 31-32.) She did not receive an athletic scholarship. (Dorrance

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[1] Because the majority of this Opinion is devoted to Defendants' summary judgment motion, the facts are set out here according to that standard.

[2] Former Plaintiff Deborah Keller Hill is no longer a party to this action.

[3] Chancellor Hooker is now deceased. The claims are against his estate.

[4] Mr. Baddour became Director of Athletics on July 1, 1997.

Aff. at 1.) During the two academic years that Ms. Jennings was a member of the team, she claims to have overheard several comments about other team members made by Coaches Dorrance and Palladino, particularly at pre-practice warm-up sessions. Ms. Jennings also claims that on two occasions Mr. Dorrance made direct inquiries into her personal life. Ms. Jennings' legal claims against the Defendants are based on those comments, remarks, and conversations.

It was common for team members to warm up together before practice by stretching. During those warm-up sessions, the team members would often discuss their personal lives including at times their sexual activities. According to Ms. Jennings, Mr. Dorrance would, on occasion, come over to the players during warm-up time, or when they were congregating at the soccer office on the practice field known as "the Hut."[5] When he joined them, he would occasionally also participate in their conversations, asking the players about their activities over the weekend and sometimes discussing the people with whom the players were sexually involved. He did not initiate these conversations about sexual activities. Ms. Jennings points to particular comments that Mr. Dorrance allegedly made on a few occasions when he joined the players' conversations. He allegedly made reference to one players's sexual partner as the "fuck of the minute" (Jennings Dep. at 52), and asked another if she was going to have a "shag fest"

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[5] Ms. Jennings does not provide a clear estimate of how often Mr. Dorrance came over to the players during warm-ups. According to Ms. Keller's deposition testimony, he would come over to them about once or twice a week, but did not always make comments. When he did make comments, they did not always deal with the social or sexual activities of the players. (Keller Dep. 127, 132.)

with her boyfriend and if she was going to "fuck him and leave him" (*Id.* at 53, 63). According to Ms. Jennings, Mr. Dorrance used the word "fuck" very often. (*Id.* at 38, 79.) Mr. Dorrance also allegedly talked about boys coming out of the players' windows after one player said she had climbed into one person's window after a sexual encounter with a different person. (*Id.* at 64; Keller Dep. at 121.)

Ms. Jennings claims Mr. Dorrance also sometimes commented on players' physical attributes, including their legs and breasts. (Jennings Dep. at 44, 51, 83) She alleges that he once called one player a "fat ass" (*Id.* at 91) and that he sometimes referred to another player, who was thought to be a lesbian, by a masculine name (*Id.* at 97, 98). Ms. Jennings also claims to have overheard Mr. Dorrance in a conversation with Mr. Prentice refer to an "Asian threesome," which she interpreted as Mr. Dorrance and two members of the team. (*Id.* at 44.) She says that he "made [one member of the team] out to be the team slut" and actually called that player a "slut," possibly in Mr. Palladino's presence. (*Id.* at 76.) Finally, Ms. Jennings claims to have heard from other players that Mr. Dorrance told Ms. Keller he would like to be a "fly on the wall" the first time one player had sex. (*Id.* at 52.) Some players, including those who were the subjects of the comments, appeared to be flattered, or at least not offended, by Mr. Dorrance's behavior. (*Id.* at 87, 88, 90; *see* Affs. of Falk, Fettig, Dacey.) Others appeared to [*670] Ms. Jennings to be upset by it. (Jennings Dep. at 49-50, 97-98.)

Mr. Palladino seems to have joined in the conversations and made comments less frequently than Mr. Dorrance. His role appears to have been a passive one, laughing at something the players said or at a comment Mr.

Dorrance made about a player. (Keller Dep. at 125.) Ms. Jennings alleges that she once heard him and Mr. Dorrance "joking back and forth about [how] they had been sending dirty e-mails, dirty jokes between them." (Jennings Dep. at 76.) Ms. Jennings said in her deposition that Mr. Palladino did not humiliate any of the women on the team. (*Id.* at 106.)

Ms. Jennings did not normally participate in the discussions about dating and sexual activities during team warm-up time, nor was she a target of Mr. Dorrance's comments about players' bodies. On two occasions, however, she was the focus of a conversation in Mr. Dorrance's presence that made her uncomfortable. During one of those conversations Mr. Dorrance made a direct inquiry of her; during the other he was merely present. The first occurred during warm-up time before practice. When the team was discussing their dating relationships, the conversation turned to Ms. Jennings, and what she was going to do with her boyfriend that weekend. Mr. Dorrance did not initiate this turn in the conversation, but he did join in the inquiry once it was made, saying "Yes, what about Trim'n?"[6] (*Id.* at 67.) Ms. Jennings did not respond to any of the speculation about her weekend. (*Id.* at 68.) Shortly after that incident, her teammates asked whether one of Ms. Jennings' male friends who had attended a game was her boyfriend. Mr. Dorrance was also present for that conversation. (*Id.* at 73.)

After the fall season and before the end of her freshman year, Ms. Jennings claims to have met with Mr. Dorrance

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[6] "Trim'n" was Melissa Jennings' nickname among the players and coaches. It was an adaptation of her custom license plate, and was not related to sex. (*Id.* at 61-62.)

individually. This "end-of season" meeting allegedly took place in Mr. Dorrance's hotel room while the team was attending a tournament in Santa Clara, California. Mr. Dorrance began the meeting by discussing Ms. Jennings' grades, which were low enough that she may have been in danger of becoming academically ineligible to play soccer. (*Id.* at 129-30.) He expressed that she needed to bring her grades up to the team standard, and although he did not say so directly, Ms. Jennings understood from the meeting that if she did not bring her grades up, she was in danger of being dismissed from the team. Mr. Dorrance then inquired into Ms. Jennings' social life, and whether this was affecting her grades. According to Ms. Jennings, Mr. Dorrance asked her, "Who are you fucking?" and Ms. Jennings replied that it was "none of his goddamn business" what she did off the field. (*Id.* at 145.) The discussion then moved to Ms. Jennings' physical performance as a player, which Mr. Dorrance also felt was not up to team standards. She left the meeting in tears. (*Id.* at 143-44.)

Ms. Jennings did not complain to Mr. Dorrance or Mr. Palladino about the behavior she claims she found offensive. She does claim to have met with Ms. Ehringhaus, who was Assistant to the Chancellor, twice in the fall of her freshman year. At the first meeting, Ms. Jennings says she told Ms. Ehringhaus about the "sexual comments that were being made" at practice. (*Id.* at 157-59.) They also discussed Ms. Jennings' dismay that Mr. Dorrance had not informed her teammates that she had been to the emergency room (this was her "first concern" in the conversation), [*671] her discomfort with the drinking that took place at some of the parties at players' houses, and her need to be reimbursed for supplies she had purchased at Mr. Dorrance's direction. (*Id.* at 153-55.) At the second meeting, Ms. Jennings did not mention the sexual

comments, but concentrated on the reimbursement issue. (*Id.* at 161.)

In May of 1998, Ms. Jennings attended a scheduled meeting with Mr. Dorrance at which he dismissed her from the team. Ms. Jennings claims that this action surprised her, because she felt that she had improved in her academic, physical, and social performance on the team. (*Id.* at 207.) She says Mr. Dorrance told her at this meeting that her physical fitness was not up to team standards. (*Id.* at 206.) She says she does not remember the details of the meeting after Mr. Dorrance told her she was cut. (*Id.* at 206.) Mr. Dorrance in his affidavit cites Ms. Jennings' failure to contribute physically, academically, and socially to the team as the reason he dismissed her. (Dorrance Aff. at 3.) According to Mr. Dorrance, he evaluated "reserves" (team members who do not play for meaningful portions of games) and permitted them to remain on the team on the basis of their contribution to the team's success in at least two of those three areas. (*Id.* at 2-3.) Ms. Jennings was not a starter and did not play in games very often. (*Id.* at 2; Jennings Dep. at 149.)

After she was dismissed from the team, Ms. Jennings' father, Craig Jennings, called and faxed Ms. Ehringhaus' office several times from May 6 to May 10. He did not mention any sexually inappropriate behavior or harassment. (Ehringhaus Aff. at 2, Ex. A-C.) In a letter to Ms. Ehringhaus dated May 12, Mr. Jennings for the first time complained of Mr. Dorrance making "inappropriate" inquiries of players such as "Who is shacking up with whom?" (*Id.* at 3, Ex. E.) The letter did not mention Mr. Palladino. Around that same time, Ms. Ehringhaus received a letter from Ms. Keller's parents complaining of "serious harassment" by Mr. Dorrance. (*Id.* at

4.) Consistent with UNC's Sexual Harassment Policy in place at the time, Ms. Ehringhaus forwarded the complaints to Mr. Baddour. Under the policy, Mr. Dorrance's supervisors, including Mr. Baddour and Ms. Miller, were responsible for reviewing the complaints and Mr. Dorrance's behavior. (*Id.*) In late May, a meeting took place among Ms. Jennings, Mr. Jennings, Mr. Baddour, Ms. Miller, Mr. Dorrance, and Ms. Ehringhaus. (*Id.* at 6; Jennings Dep. at 224.) In that meeting, Ms. Jennings' dismissal from the team was discussed, as was Mr. Dorrance's behavior that Ms. Jennings claims to have found offensive. (Jennings Dep. at 224.) Mr. Palladino was not present at the meeting. Incident to the UNC Athletic Department's investigation of the complaints against him, in June 1998 Mr. Dorrance apologized to Ms. Jennings and was directed to refrain in the future from discussing matters of a sexual nature with players. (Baddour Aff. at 2-3; Ehringhaus Aff. Ex. N.) On August 25, 1998, Ms. Jennings and Ms. Keller filed the complaint that initiated this case.

II.

In Plaintiff's Motion to Strike Defendants' Amended Answer and to Enter Default Judgment for Plaintiff, Ms. Jennings asserts that Mr. Dorrance made a statement in his deposition testimony that contradicted Defendants' Amended Answer. In the Amended Answer, Defendants denied Paragraph 19 of Plaintiff's First Amended Complaint which asserted that "On repeated occasions from 1996 through the present, Dorrance used his position of authority as women's soccer coach to make lewd and degrading comments regarding [*672] other team members in the presence of plaintiffs." In his deposition, Mr. Dorrance stated that he could not remember the content of all conversations he engaged in with players

before practices, and ... ld therefore neither admit nor deny "whether [he] discuss... sexual activity among the team players." (Dorrance Dep. at 51.)

A party must have acted in bad faith or willful disobedience of a court order before a court may use its inherent powers to impose sanctions. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980); *Strag v. Bd. of Tr.*, 55 F.3d 943, 955 (4th Cir. 1995). Mr. Dorrance's response in his deposition does not necessitate striking Defendants' Amended Answer. It is not clearly factually inconsistent with the Amended Answer, particularly since it was given in response to a less than clear line of questioning. Furthermore, the response is not the type of behavior that would prompt the Court to use its inherent powers to strike the Amended Answer or to enter default judgment against Defendants for filing false pleadings. There is no evidence of bad faith. Plaintiff's motion to strike and to enter default judgment will therefore be DENIED.

III.

Plaintiff also moves to strike exhibits C through H to the affidavit of Mr. Dorrance on the grounds that they are not authenticated and are hearsay, and therefore improper for the Court to consider in ruling on the Defendants' motion for summary judgment. In considering a motion for summary judgment, a court may not consider documents that at trial would constitute inadmissible hearsay. *Fed. R. Civ. P. 56(e)* ("Affidavits shall...set forth such facts as would be admissible in evidence."); *Md. Highway Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1251-52 (4th Cir. 1991) ("Hearsay evidence, which is inadmissible at trial, cannot be considered on a motion

for summary judgment."). A court may, however, consider evidence that would fall under a hearsay exception. Federal Rule of Evidence 803(6) states that "Records of Regularly Conducted Activity" are an exception to the hearsay rule. Fed. R. Evid. 803(6). Such records are a data compilation of events, conditions, or opinions made at or near the time of the events, conditions, or opinions by a person with personal knowledge of them, kept in the course of a regularly conducted activity and recorded as a regular practice. *Id.* This may be testified to by either the custodian of the information or a qualified witness. *Id.*

The exhibits at issue are as follows. Exhibit C is final statistical composite rankings, evaluating the team in fitness, competition, and technical skill at the end of the fall season in 1997. Exhibit D is an academic ranking of all players by cumulative grade point average at the end of spring 1998. Exhibit E is the results of standard physical tests of the players in spring 1998. Exhibit F is the spring 1998 "final statistical composite power rankings" (similar to Exhibit C). Exhibit G is the instructions for a team self-evaluation conducted in spring 1998. Exhibit H is a compilation of the results of the evaluations described in Exhibit G.

These six exhibits are properly authenticated; they are attached to a sworn affidavit and are described by the affiant. *Cf. Orsi v. Kirkwood,* 999 F.2d 86, 91 (4th Cir. 1993) (upholding trial court's decision not to admit into evidence unsigned documents introduced the day of trial where "none of the documents were authenticated through attached affidavits"). On the issue of hearsay, the exhibits qualify as Records of Regularly Conducted Activity, and would be admissible at trial. *See Fed. R. Evid. 803(6).* Mr. Dorrance testified in his affidavit

that he developed the formats in which the information in these exhibits [*673] was recorded in order to evaluate team members' performance and improvement. This testimony reveals that he is qualified to testify about the exhibits, and that the information contained in the exhibits was accurately kept, as it would be of little use to his evaluations if it were not. Ms. Jennings' vague assertion that the exhibits are "incomplete" is also unconvincing; Mr. Dorrance's testimony gives a satisfactory explanation of the format of the exhibits. Plaintiff's motion to strike these exhibits will be DENIED.

IV.

Defendants move for summary judgment on all of the claims that remain from the First Amended Complaint: (A) the Title IX claim against the University; (B) the § 1983 claims for damages against Dorrance for invasion of privacy, against Dorrance and Palladino for sexual harassment, and against Ehringhaus, Swofford, Baddour, Miller, and the Hooker estate for failure to supervise Dorrance and Palladino and prevent the alleged violations of Ms. Jennings' rights; and (C) the common law invasion of privacy claim against Dorrance.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of any material fact. *Fed. R. Civ. P. 56(e)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Cox v. County of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001). Material facts are those that support an essential element of the claim. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In other words, a fact is material "when its existence or non-existence could lead a jury to different

outcomes." *Cox*, 249 F.3d at 299. A genuine issue exists if a reasonable jury could return a verdict for the non-moving party based on the evidence. *Id.* Judgment as a matter of law is appropriate where the non-moving party has failed to raise a genuine issue of material fact on an element on which that party would bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

A.

Defendants move for summary judgment on Ms. Jennings' Title IX claim against the University. Title IX states in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2004). Courts have looked to case law for *Title VII of the Civil Rights Act of 1964* which addresses sexual discrimination in the workplace, *see* 42 U.S.C. § 2000e-2(a)(1) (2004), to establish what constitutes discrimination based on sex under Title IX. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649-51, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) (Title IX case relying on Title VII decisions to establish that "sexual harassment can constitute discrimination on the basis of sex under Title IX"); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281-83, 141 L. Ed. 2d 277, 118 S. Ct. 1989 (1998) (same); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992) (Title IX case relying on Title VII case *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986), to establish that a male teacher's sexual harassment of a female student is discrimination on the basis of sex). Sexual harassment as recognized by Title VII precedent

is therefore considered a form of discrimination for Title IX purposes. *See, e.g., Davis,* 526 U.S. at 649-51. This includes so-called "hostile environment" sexual harassment, which is alleged in this case. *See Meritor,* 477 U.S. at 66 [*674] (recognizing hostile environment sexual harassment as actionable under *Title VII); Davis,* 526 U.S. at 651 (citing *Meritor* with approval).

In order to be actionable under Title IX, the sexual harassment must be "so severe, pervasive, and objectively[7] offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis,* 526 U.S. at 650. "The objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale v. Sundowner Offshore Services.,* 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) (quoting *Harris v. Forklift Sys.,* 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)). Such an inquiry requires "careful consideration of the social context" in which the alleged discrimination occurred. *Id.* The impact of the behavior in its social context in turn depends upon a "constellation of surrounding circumstances, expectations, and relationships

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[7] It is unclear whether subjective offensiveness, which is a requirement in Title VII cases, *see Faragher v. City of Boca Raton,* 524 U.S. 775, 787, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998), is also a requirement in Title IX cases. Although *Davis* cites Title VII precedent, the standard developed there refers only to objective, and not subjective, offensiveness. *Davis,* 526 U.S. at 633. The decision in this case does not depend on whether Ms. Jennings subjectively found the behavior offensive, because the facts she has alleged do not support a finding even of objective offensiveness. Therefore, the issue need not be resolved in this Opinion.

which are not fully captured by a simple recitation of the words used" by the alleged harasser. *Id.* at 81-82. Possible components of this constellation are "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it interferes with an employee's work performance," *Harris,* 510 U.S. at 23; as well as the ages of the harasser and the victim and the number of individuals involved, *Davis,* 526 U.S. at 651 (looking to *Department of Education, Office of Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12041-42 (1997)).* "These standards for judging hostility are sufficiently demanding to ensure that Title VII [and by extension, Title IX] does not become a general civility code....Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher,* 524 U.S. at 788 (internal quotations and citations omitted). In analyzing sexual harassment claims, courts should employ "common sense, and an appropriate sensitivity to social context." *Oncale,* 523 U.S. at 82.

Finally, in addition to showing severe, pervasive, and objectively offensive sexual harassment, a Title IX plaintiff seeking monetary damages in a private action[8] must show that the funding recipient or an official with the power to address the discrimination on behalf of the recipient had actual

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[8] In *Cannon v. University of Chicago,* 441 U.S. 677, 689, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), the Supreme Court recognized an implied right of action under Title IX. In *Franklin,* 503 U.S. at 76, the Court confirmed that monetary damages are an available remedy in such an action.

knowledge of the discrimination and acted with deliberate indifference. *Davis,* 526 U.S. at 650. The deliberate indifference must effectively cause the discrimination. *Id. at* 642-43.

[*675] There is no genuine issue of any material fact on any of the elements of Ms. Jennings' Title IX claim. While inappropriate in some respects and quite possibly offensive to her, the conduct that she alleges occurred was not "severe, pervasive and objectively offensive" to the point of depriving her of educational opportunities. The comments Ms. Jennings claims to have found offensive occurred less than weekly. When comments were made, they were not severe, especially when the social context is considered.[9] The players were teasing and joking amongst themselves on these occasions. Mr. Dorrance did not initiate these discussions or steer the players' conversation in the direction of sex. The comments were only "mere utterances," and were not physically threatening. There is no evidence, beyond Ms. Jennings' own vague assertion, that the atmosphere at practice interfered with her performance on the field or in the classroom. In fact, in contradiction to that claim, Ms. Jennings stated that before each of her meetings with Mr. Dorrance, she believed that her academic and physical performances had improved. (Jennings Dep. at 125-26, 207.)

As for the inquiries Mr. Dorrance allegedly made directly to Ms. Jennings, one of these occurred in a group setting and

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[9] The number of individuals involved is also a part of the social context. Ms. Jennings alleges that several players were the focus of Mr. Dorrance's comments. However, these players were presumably all present together when the comments were allegedly made, and they had initiated the conversations.

was only mildly related to any sort of sexual topic. In the setting of an athletic practice where players are discussing their social activities, a coach inquiring about a player's weekend, or about whether a certain person is her boyfriend, is not harassment. Even if the inquiry about her weekend was made in the context of other players discussing their sexual activities, Ms. Jennings admits that the "What about Trim'n?" inquiry was "totally different" than when Mr. Dorrance was talking about "guys coming out of the windows." (Jennings Dep. at 67.) The conversation Ms. Jennings alleges took place in Mr. Dorrance's hotel room does not elevate the cumulative effect of the other comments to the level of severe and pervasive harassment. The question, "Who are you fucking?" is admittedly harsh. However, it is only one question, and it was asked immediately after his discussion of her low grades. When she rebuffed the question, Mr. Dorrance did not make any further inquiry or discuss any sexual matters. Indeed, this is the only time Ms. Jennings alleges that he alluded to sex in relation to her. Nor was the comment physically threatening; it was at most a "mere offensive utterance." While there is a large disparity in ages between Mr. Dorrance and Ms. Jennings, the social context also incorporates the fact that he was her coach and had an interest in her academic performance and the factors affecting it, especially insofar as her academics impacted her eligibility to play.

Finally, Mr. Palladino made fewer comments and did so even less frequently than Mr. Dorrance. The same analysis applies to his conduct as applies to Mr. Dorrance's. Thus, considering the "constellation of circumstances," the behavior at issue does not constitute severe, pervasive, and objectively offensive sexual harassment that deprived Ms. Jennings of her

educational opportunities. The defendants are entitled to summary judgment on this claim.

B.

Ms. Jennings makes several claims for damages under 42 U.S.C. § 1983, [*676] which states: "Every person who, under color of any statute...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured...." 42 U.S.C. § 1983 (2004). All claims are against Defendants in their individual capacities. To establish § 1983 individual liability, a plaintiff must affirmatively show that the defendant personally acted to deprive her of her rights. *Wright v. Collins,* 766 F.2d 841, 850 (4th Cir. 1985). The individual defendant must have had "personal knowledge of and involvement in the alleged deprivation of [plaintiff's] rights in order to be liable." *Id.*

1.

Ms. Jennings alleges that Mr. Dorrance violated her constitutional right to privacy. There are two generally recognized privacy interests: the "interest in independence in making certain kinds of important decisions" and the "interest in avoiding disclosure of personal matters." *Whalen v. Roe,* 429 U.S. 589, 599-600, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977). The former interest has most often been implicated by laws that affect an individual's decisions regarding marriage, procreation and contraception, family relationships, and the rearing and education of children. *Id.* at 600 n.26; *Paul v. Davis,* 424 U.S. 693, 713, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). The latter

interest, the right to "informational privacy," *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health*, 317 F.3d 357 at 359, may be implicated when an individual is forced to disclose information regarding, for instance, sexual matters or his body and health. *See Whalen*, 429 U.S. at 602 (medical information); *Eastwood v. Department of Corrections*, 846 F.2d 627, 631 (10th Cir. 1988) (sexual history); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (medical information); *see also Jennings v. UNC*, 240 F. Supp. 2d 492, 505 (M.D.N.C. 2002). Cases on this subject often deal with the questioning of employees or potential employees by employers, *see, e.g., Walls v. City of Petersburg*, 895 F.2d 188, 193-94 (4th Cir. 1990) (employee questionnaire inquiring into homosexual relationships, marital status, children, arrest of family members, and financial information), or with statutes requiring disclosure of personal, medical information, *see, e.g., Whalen*, 429 U.S. at 602 (database of recipients of prescriptions for controlled substances); *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health and Envtl. Control*, 317 F.3d 357, 370 (4th Cir. 2002) (reporting requirements for abortion clinics).

Ms. Jennings' circumstances are clearly distinguishable from precedent in both the independent decision-making and informational privacy lines of cases. She asserts that Mr. Dorrance's two isolated inquiries into her dating relationships violated both her right to make decisions about procreation and her right to avoid disclosure of personal information. However, there is no evidence that Ms. Jennings' ability to make decisions about procreation was in any way substantively impeded by Mr. Dorrance's inquiries. As for the right to informational privacy, Ms. Jennings' situation is clearly distinguishable from that of the employees in cases such as

Walls, 895 F.2d at 190, where plaintiff was dismissed for her failure to respond to an employee questionnaire, or *Eastwood,* 846 F.2d at 631, where plaintiff was threatened with dismissal and "forced to answer" questions about her sexual history. In Ms. Jennings' case, disclosure of personal information was not required, nor was she forced to answer questions about her sexual activities. In fact, she never disclosed any personal information. Neither did her failure to [*677] disclose such information result in her dismissal from the team. She was not dismissed until over a year after her refusal to answer Mr. Dorrance's inquiry into her sexual activity. Ms. Jennings has raised no genuine issues of material fact that could lead a reasonable jury to conclude that Mr. Dorrance violated her right to privacy. Mr. Dorrance is therefore entitled to judgment as a matter of law on this claim.

2.

Ms. Jennings also claims that Mr. Dorrance and Mr. Palladino violated her constitutional rights by sexually harassing her. An individual has a constitutional right to be free from gender discrimination that does not serve an important governmental objective and is not substantially related to achieving that objective. *Davis v. Passman,* 442 U.S. 228, 234-35, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979). Applying this concept, courts have held that intentional sexual harassment violates the *Fourteenth Amendment* and is actionable under § 1983. *Beardsley v. Webb,* 30 F.3d 524, 529 (4th Cir. 1994). As with Title IX, the standards of Title VII have been applied by courts in § 1983 sexual harassment cases. *Id.* Title VII precedent recognizes that hostile environment sexual harassment is a form of sexual discrimination. *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 64, 66, 91 L. Ed. 2d 49, 106

S. Ct. 2399 (1986). By combining Title VII and § 1983 standards, it is concluded that in order for an individual to prove hostile environment sexual harassment in violation of § 1983, she must show that she was subjected to conduct that was (1) unwelcome,[10] (2) based on her sex, (3) sufficiently severe or pervasive to create an abusive environment, (4) performed under color of state law, and that (5) deprived her of her rights, privileges, or immunities secured by the Constitution or Federal law. *Jennings*, 240 F. Supp. 2d at 505-06. Because the crux of this standard, the severity and pervasiveness of the conduct, is also a part of the analysis for a Title IX claim, the discussion and conclusion in that section of this Opinion apply equally well here. For the same reasons stated above, the defendants are entitled to summary judgment on Ms. Jennings' claims of sexual harassment under § 1983.

3.

In certain situations, supervisory officials may be held liable for the constitutional injuries inflicted by their subordinates. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). There are three elements in establishing such liability: (1) "that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff"; (2) "that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices'"; and (3) "that there was an 'affirmative causal link' between the supervisor's

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[10] The "unwelcome" requirement parallels the Title VII requirement of subjective offensiveness. As discussed in note 7 above, the issue of subjective offensiveness need not be reached here.

inaction and the particular constitutional injury suffered by the plaintiff." *Id. at 799.*

Defendants Hooker, Ehringhaus, Swofford, Baddour, and Miller are entitled to summary judgment on this claim. As established above, a reasonable jury could not find that Dorrance or Palladino engaged in behavior that violated Ms. Jennings' [*678] constitutional rights. Because their behavior did not pose an unreasonable risk of constitutional injury, it is unnecessary to reach the question of whether these other defendants had knowledge of their behavior. Summary judgment is therefore appropriate on Ms. Jennings' supervisory liability claims under § 1983.

C.

Defendants also move for summary judgment on Ms. Jennings' state law claim against Mr. Dorrance for common law invasion of privacy. The state of North Carolina recognizes two types of invasion of privacy actions: (1) appropriation of plaintiff's name or likeness for defendant's advantage, and (2) "intrusion into the seclusion, solitude, or private affairs of another ('intrusion tort')." *Miller v. Brooks,* 123 N.C. App. 20, 472 S.E.2d 350, 353 (N.C. Ct. App. 1996). *See also Broughton v. McClatchy Newspapers, Inc.,* 161 N.C. App. 20, 588 S.E.2d 20, 27 (N.C. Ct. App. 2003). Plaintiff's complaint and briefs do not specify, but her claim is assumed to be the latter.

"Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion." *Id. at 29.* A defendant's conduct must be "so egregious as to be 'highly offensive to a reasonable person.'" *Id.* (quoting *Smith v. Jack*

Eckerd Corp., 101 N.C. App. 566, 400 S.E.2d 99, 100 (N.C. Ct. App. 1991)). It is not enough that plaintiff was offended by the conduct. *Jack Eckerd Corp.*, 400 S.E.2d at 100. Behavior found by North Carolina courts sufficient to support a claim of intrusion includes physically invading another's home, installing a hidden camera in another's bedroom, rifling through and disposing of an individual's mail, *Miller*, 472 S.E.2d at 354, and viewing and disseminating personal information in an individual's state personnel file without authorization, *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76, 90 (N.C. Ct. App. 2002).

In this case, there were two direct inquiries into Ms. Jennings' personal life. Even if one was made crudely, this does not rise to the level of egregious conduct required by North Carolina courts. Ms. Jennings may have been offended, but she declined to answer the questions and that was the end of it. There was no physical or sensory intrusion into her home or personal records analogous to those recognized by North Carolina courts as tortious. Mr. Dorrance is therefore entitled to summary judgment on this claim.

D.

In summary, Defendants' motion for summary judgment on the Title IX claim, the § 1983 claims, and the state law claim against Dorrance will be GRANTED.

V.

In conclusion, Plaintiff's Motion to Strike Amended Answer by Defendants and for Default Judgment [Doc. # 137] and Plaintiff's Motion to Strike Exhibits C through H to the

Affidavit of Anson Dorrance [Doc. # 142] will be DENIED. Defendants' Motion for Summary Judgment [Doc. # 115] will be GRANTED.

This 27th day of October, 2004

United States District Judge

ORDER

For the reasons set forth in a contemporaneously filed Memorandum Opinion, Defendants' Motion to Submit Evidence Under Seal the Affidavit of David C. Lanier, and Depositions of Melissa Jennings, Craig Jennings, Martha Jennings, Debbie Keller, Ronald Keller, and Judith Keller [Doc. # 117] is DENIED.

This 27th day of October, 2004

United States District Judge

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV. JURISDICTION AND VENUE
CHAPTER 81. SUPREME COURT

28 USCS § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

HISTORY:

(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

TITLE 20. EDUCATION

CHAPTER 38. DISCRIMINATION BASED ON SEX OR BLINDNESS

20 USCS § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition. in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions. in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act [enacted June 23, 1972], nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both

sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets. this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine. this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy. in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations. this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under *section 501(a) of the Internal Revenue Code of 1954* [1986] [26 USCS § 501(a)], the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the

membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences. this section shall not apply to-
(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or
(B) any program or activity of any secondary school or educational institution specifically for--
(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or
(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions. this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and
(9) Institution of higher education scholarship awards in "beauty" pageants. this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to

individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance. Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined. For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 USCS § 1681, CONT'D . . .

HISTORY:

(June 23, 1972, P.L. 92-318, Title IX, § 901, 86 Stat. 373; Dec. 31, 1974, P.L. 93-568, § 3(a), 88 Stat. 1862; Oct. 12, 1976, P.L. 94-482, Title IV, § 412(a), 90 Stat. 2234.)

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No. 07-43

FILED
AUG 24 2007
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL,
Petitioner,

v.

MELISSA JENNINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

DANIEL F. KONICEK
Konicek & Dillon
21 W. State St.
Geneva, IL 60134
(630) 262-9655

MARCIA D. GREENBERGER
DINA R. LASSOW*
FATIMA GOSS GRAVES
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

Counsel for Respondent

* Counsel of Record

August 24, 2007

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the *en banc* Fourth Circuit properly ruled that a jury should determine the disputed facts regarding the liability of the University of North Carolina at Chapel Hill (UNC) for damages to student-athlete Melissa Jennings for its deliberate indifference to sexual harassment by its women's soccer coach, given that Jennings presented sufficient evidence for a reasonable jury to conclude that:

a) she notified the university of the coach's sexually hostile actions; and

b) the harm she suffered from the sexual harassment, including severe emotional distress, had a negative impact on her academic performance and ultimately her place on the varsity soccer team, causing her to be denied access to educational opportunities and benefits at UNC.

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Title IX of the Education Amendments of 1972, 21 U.S.C. § 1681 *et seq.* 1

BRIEF IN OPPOSITION

INTRODUCTION

Title IX of the Education Amendments of 1972, 21 U.S.C. § 1681 *et seq.*, bars sex discrimination—including sexual harassment—by educational institutions that receive federal funds. *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). To ensure that recipients will be liable for damages only for their own conduct in sexual harassment cases, this Court issued decisions in 1998 and 1999 that establish stringent standards for liability.

In *Gebser* v. *Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998), a case involving teacher-student sexual harassment, this Court determined that, to be liable for damages for sexual harassment under Title IX, an appropriate school official must have knowledge of the harassment and, in the face of that knowledge, the school must be deliberately indifferent to the harassment. In the context of student-on-student harassment, this Court held in *Davis* v. *Monroe County. Bd. of Educ.*, 526 U.S. 629, 652 (1999), that a private damages action may lie where "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."

Applying these standards, the Court of Appeals for the Fourth Circuit, sitting *en banc*, ruled 8-2 that Melissa Jennings had "presented sufficient evidence to raise triable questions of fact on all disputed elements of her Title IX [sexual harassment] claim." Pet. App 22a. A soccer player recruited by Head

Coach Anson Dorrance, she was cut from the team during exam period of her sophomore year, reflecting the adverse academic and athletic consequences Jennings suffered because the University of North Carolina at Chapel Hill (UNC) failed to address the sexually hostile environment created by Coach Dorrance. Nothing in this straight forward application of *Gebser* and *Davis* provides a reason for this Court to grant review.

To begin with, there is no dispute in this case that Jennings must demonstrate that the hostile environment created by Coach Dorrance was severe enough to deny her equal access to concrete educational opportunities and benefits. Moreover, she must demonstrate that UNC was on notice regarding the hostile environment, and was deliberately indifferent to addressing it. It is those standards that the Fourth Circuit explicitly applied in finding that Jennings presented enough evidence to allow a reasonable jury to determine whether she carried the burden of meeting them.

Nor is there any dispute among the courts of appeals over the appropriate standard for damages liability in a Title IX sexual harassment case. The Seventh Circuit decision cited by UNC as purportedly in conflict with the Fourth Circuit applies the same well-settled *Gebser* and *Davis* standards. Indeed, the only real disputes in this case are factual.

Although, to be sure, there are some key facts that even UNC cannot dispute: There is no dispute, for example, that Coach Dorrance made inappropriate comments to his students during team practices and events attended by Jennings, a 17-year-

old member of the soccer team. There also is no dispute that Jennings met with UNC's legal counsel, an appropriate school official under *Gebser*, and that no action was taken by UNC after the meeting. Nor is there any dispute that after Jennings was cut from the team and her parents complained vociferously, Coach Dorrance wrote a letter to her father acknowledging that his conduct was "inappropriate" and "unacceptable." Finally, there is no dispute that UNC took no action to determine how it might otherwise remedy the impact that the coach's unacceptable conduct had on Jennings' performance.

However, many other remaining factual disputes remain concerning the scope and effect of the coach's inappropriate conduct, the specific information imparted to UNC regarding that conduct, and the precise nature and cause of the injury suffered by Jennings. These issues reinforce that this case should be allowed to proceed to trial to allow those factual disputes to be resolved by a jury.

UNC attempts to dress up these factual disputes as legal issues. In so doing, it improperly asks this Court to step into the role of trier of fact. But petitions for writs of certiorari are not granted "to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). In addition, the factual nature of UNC's claims highlights that any review here is premature. The Fourth Circuit's decision merely denies summary judgment to UNC because of the material facts in dispute. After trial, there may be no legal issues that need resolution, and, if there are such issues, they would be properly defined.

UNC has presented no reason why this Court should grant certiorari, particularly of this interlocutory decision, and its petition should be denied.

STATEMENT OF THE CASE

Melissa Jennings was only 17 years old when she arrived as a freshman at UNC as a recruited student-athlete on the women's soccer team.[1] Pet. App. 3a. As the Fourth Circuit sets forth in pages and pages of descriptions of highly offensive behavior (Pet. 2a-28a), during practices and other team gatherings the head coach, 45-year-old Anson Dorrance, regularly "bombarded [his] players with crude questions and comments about their sexual activities and made comments about players' bodies that portrayed them as sexual objects." Pet. App. 3a. These sexually hostile comments were difficult to escape, they "permeated team settings," often occurring "during team warm-up time * * * or any time the team was together, whether at home or traveling." Pet. App. 16a. The "questions and comments moved from girl to girl to girl"—some directed at Jennings—and she and her teammates had no choice but to endure them all. Pet. App. 7a.

For example, Jennings heard Dorrance ask one teammate whether there was "a guy [she hadn't] f**ked yet?" and another whether she was planning a "shag fest" with her boyfriend. Pet. App. 15a. He then asked Jennings whether she had "'the same

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[1] We present these facts, and any inferences drawn from them, in the light most favorable to Melissa Jennings. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

good weekend' with her boyfriend." Pet. App. 16a. Another time, he asked one player whether she was "going to have sex with the entire lacrosse team." Pet. App. 3a-4a. In addition, he frequently commented on the "nice rack[s]" and "nice legs" of some of the players. *Ibid.*

Jennings also endured Dorrance's musings about his sexual fantasies. She overheard her him talk about "an Asian threesome"—having "group sex with his Asian players." Pet. App. 4a. He told Debbie Keller, one of the team captains, that he would "'die to be a fly on the wall' the first time her roommate, another team member, had sex" because he believed the roommate "was a virgin with repressed sexual desire." Pet. App. 4a,16a. That fantasy made such an impression on the team that they were still talking about it in front of Jennings a year or more after he told it to Keller. Pet. App. 5a n. 1.

The court below also described Jennings' end-of-season performance evaluation that took place in Coach Dorrance's dark hotel room during a tournament. With the two of them alone in the room, "knee-to-knee, bed not made," in the middle of discussing how she needed to improve her grades, he asked Jennings: "Who are you f**king?" Pet App. 6a, 15a.

In addition to all the out-of bounds, offensive sexual remarks, the court discussed the evidence that Coach Dorrance engaged in unwanted and highly inappropriate physical contact with Keller in front of the team. He touched her stomach, and dangled his hand in front of her chest, while putting his arm around her and rubbing her back. Pet. App. 5a.

These advances made Keller's "skin crawl," but, reflecting the obvious power relationship between this successful coach and his young players, she testified that she did not object because she did not want to lose her playing time. Pet. App. 14a-15a.

Jennings testified that experiencing all of the coach's actions, comments and questions—whether they were directed at her individually, the teammate next to her, or the entire team—made her feel "uncomfortable, filthy and humiliated." Pet. App. 7a. The Fourth Circuit noted that her "testimony is supported by a psychiatrist's opinion that Dorrance's destructive practice of verbal sexual abuse caused her to suffer severe emotional distress." Pet. App. 20a.

Jennings further explained that because of the sexually hostile environment created by the coach, her performance as a soccer player and her academic work suffered. *Ibid.* She testified that she received low grades the entire time she was on the team because she "found it hard to focus" in the midst of a hostile environment and was uncomfortable and unhappy. Pet. App. 34a. And her entire soccer experience and ability to improve was negatively affected, as she struggled to "stay out of [Dorrance's] radar" while he was making his sexual remarks. Pet. App. 21a. Jennings was ultimately cut from the team by Coach Dorrance at the end of her sophomore year. Pet. App. 8a.

The court below also discussed the meeting that took place during the fall of 1996, Jennings' first soccer season at UNC, with Susan Ehringhaus, Senior University Counsel and Assistant to the Chancellor. Jennings testified that at that meeting

she described Coach Dorrance's sexual questions and comments to the team, and the feelings of discomfort and humiliation that they caused her. Pet. App. 22a. Ehringhaus took no action after the meeting and merely told Jennings that Dorrance "was a 'great guy' and that she should work out her problems directly with him." *Ibid.*

UNC did not respond to Jennings' complaint about the hostile environment at all until May 1998, after she had been cut from the team and her parents complained. On June 9, 1998, the Athletic Director sent Jennings' father a letter stating that Coach Dorrance "now realizes that his involvement in [team] discussions is inappropriate, and he will immediately discontinue * * * these unacceptable conversations." Pet. App. 91a. The next day, the Athletic Director issued a letter of reprimand to Coach Dorrance, notifying him that "it is inappropriate for you to have conversations with members of your team (individually or in any size group) regarding their sexual activities." *Ibid.*

On August 25, 1998, Jennings and Keller sued UNC and several of its employees individually and in their capacity as UNC employees.[2] Pet. App. 9a. Afterwards, Jennings was so severely threatened and harassed that "UNC officials warned her that they could not guarantee her safety on campus." *Ibid.* She was forced to spend her senior year at another school, though awarded a degree from UNC. *Ibid.*

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[2] In its *en banc* decision, the Fourth Circuit affirmed the district court's grant of summary judgment as to all of the individual defendants except for Coach Dorrance and Susan Ehringhaus. Pet. App. 23a. UNC was the only defendant to seek this Court's review. Pet. ii.

Several years later, on March 19, 2004, Coach Dorrance sent a letter of apology to Keller, acknowledging that his participation in "discussions of th[e] team members' sexual activities or relationships with men" was "altogether inappropriate and unacceptable." J.A. 777. Keller then settled her claims with all defendants and filed a stipulation of dismissal with prejudice on March 24, 2004. Pet. App. 92a. The district court granted defendants' motion for summary judgment on October 27, 2004. Pet. App. 155a.

On appeal, the Fourth Circuit, in a split decision, upheld the district court. Pet. App. 76a. In an opinion written by District Judge Dever, sitting by designation, the court concluded that there was no hostile environment because the Coach's conduct had not "crossed the line" between vulgar, mildly offensive language and sexual harassment. Pet. App. 111a. Judge Michaels dissented, emphasizing that because he believed that "Jennings had proffered facts showing that the soccer team environment was persistently degrading and humiliating to her and to other young women, she is entitled to a trial." Pet. App. 129a-130a.

The Fourth Circuit granted Jennings' petition for rehearing *en banc*, vacating the panel decision. Pet. App. 2a. On April 19, 2007, in an 8-2 decision,[3] the court reversed the district court's grant of summary judgment. *Ibid.* Closely following this Court's decisions in *Gebser* and *Davis*, the court held

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[3] Judge Niemeyer, joined by Judge Williams, dissented from the majority decision.

that the facts put forth by Jennings "are sufficient to establish that Jennings gave Ehringhaus, and by extension UNC, actual notice of the hostile environment created by Dorrance. This notice and the University's failure to take any action to remedy the situation would allow a rational jury to find deliberate indifference to ongoing discrimination." Pet. App. 22a. The court further found that a reasonable jury could determine that the crude questioning, comments, touching, and other manifestations of sexual harassment toward the young women on his soccer team, including 17-year-old Jennings, were "sufficiently degrading to create a hostile or abusive environment." Pet. App. 13a-14a.

The court also determined that Jennings had put forth evidence that she had been denied equal access to educational benefits by demonstrating that her academic and athletic performance was negatively affected by the harassment. It pointed to the fact that Jennings "testified that the hostile atmosphere created by Dorrance made her feel humiliated, anxious, and uncomfortable; these effects, in turn, had a negative impact on her participation and performance in soccer and on her academic performance." Pet. App. 20a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR WITH THIS COURT'S PRECEDENTS.

In support of certiorari, UNC argues that the Fourth Circuit's decision conflicts with a decision of the Seventh Circuit and with this Court's Title IX

jurisprudence. Pet. App. 19a-20a. There simply is no conflict among the courts of appeals,[4] and the decision below is fully in accord with this Court's decisions in *Gebser* and *Davis*. Review is therefore unwarranted. SUP. CT. R. 10.

A. The Fourth Circuit's Ruling Is Consistent With Rulings From Other Circuits.

UNC contends that the Fourth Circuit's ruling has contributed to an "apparent" conflict among the lower courts. Pet. 20. There is no apparent conflict—much less a real one. The only case that UNC claims is in conflict with the Fourth Circuit is *Gabrielle M.* v. *Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817 (7th Cir. 2003). But in *Gabrielle M.*, the Seventh Circuit applied the same legal standards as the Fourth Circuit. It reached a different outcome because the facts it addressed were entirely different.

Both the Fourth Circuit and the Seventh Circuit applied the stringent *Gebser* and *Davis* standards for establishing a sexual harassment claim under Title IX. In the instant case, the Fourth Circuit properly held that the facts offered by Jennings were sufficient to allow a jury to decide whether the team environment was so hostile that it severely affected her emotional state, and had a negative impact on

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[4] UNC also claims that a Second Circuit decision, *Hayut* v. *State Univ. of N.Y.*, 352 F.3d 733 (2d Cir. 2003), is in conflict with the Seventh Circuit. *Hayut* involves the sexual harassment of a college student by a professor, and is very similar to this case. Like the Fourth Circuit, as discussed below, the Second Circuit properly applied this Court's precedents to the facts before it, and its decision does not raise any conflict.

her academic and athletic performance.[5] Pet. App. 20-21a. Put differently, it held that a reasonable jury could find that the sexually hostile environment had deprived Jennings of access to educational opportunities and benefits at UNC, including her ability to stay on the soccer team, and to perform as well as she otherwise might academically.

To be sure, the Seventh and Fourth Circuits reach different outcomes, but the key difference between the decision below and the *Gabrielle M.* case is the very different facts to which the Seventh Circuit applied the legal standards. In stark contrast to the facts here, *Gabrielle M.* involved student-on-student harassment by a five year-old kindergartner, not a 45-year-old coach harassing teenage and young adult students. Further, in *Gabrielle M.*, the school district immediately attempted to address the harassment—again in contrast to the uncontraverted evidence presented by Jennings that UNC did

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[5] This case does not raise the question of whether the rigorous *Davis* deprivation of access to educational opportunities or benefits standard used by the Fourth Circuit applies to teacher-student harassment cases. Compare *Sauls* v. *Pierce County Sch. Dist.*, 399 F.3d F.3d 1279, 1284 (11th Cir. 2005) ("Because this case involves teacher-on-student harassment, Appellants need not establish [that the] misconduct was 'so severe, pervasive, and objectively offensive' that it denied [the victim] equal access to educational programs or opportunities.") with Pet. App. 19a n.2. Accordingly, this Court need not reach that issue here. *Texas* v. *Mead*, 465 U.S. 1041, 1042 (1984) (Stevens, J., respecting the denial of the writ) (The "Court's decision to deny the petition for a writ of certiorari [when the issue discussed by the dissent was neither presented to the court below nor raised in the petition for certiorari] is demonstrably consistent with the principles which inform [the] exercise of certiorari jurisdiction.").

nothing following her meeting with Ehringhaus. Indeed, the rest of Jennings' freshman soccer season and her full sophomore season went by (culminating with her being cut from the team), before the university took any steps to end the Coach's undisputedly improper behavior. Pet. App. 8a. Even then, UNC responded only by sending a letter acknowledging that Dorrance's sexual comments were inappropriate and unacceptable. *Ibid.* It took no steps to remedy the injury caused by Dorrance's behavior, and in fact counseled her to leave the university rather than offer her protection after she filed this case. Pet. App. 9a.

In its effort to create a conflict with *Gabrielle M.*, UNC's petition ignores that Jennings has put forth specific evidence that the sexually hostile environment resulted in concrete harm. Pet. 19-20. From the very start of her freshman year at UNC, she suffered severe emotional distress, was unable to concentrate on her school work, received poor grades, avoided her soccer coach during practice, and was ultimately dismissed from the team. Pet. App. 20-21a. In contrast, in *Gabrielle M.*, the court found it difficult to determine the concrete effect on a five-year-old's access to education resulting from what it believed to be imprecisely defined harassment from another five-year-old. 315 F.3d at 822-23. It is these factual differences, not legal differences, that explain the results in the two cases. Accordingly, there is no legal issue that needs to be settled by this Court. See *Johnson*, 268 U.S. at 227 ("We do not grant certiorari to review evidence and discuss specific facts.").

B. The Fourth Circuit Applied This Court's Title IX Precedents Properly.

UNC further asserts that the decision below conflicts with this Court's decisions in *Gebser* and *Davis*. Pet. 20-29. These claims are also meritless.

1. The Decision Below Is Consistent With *Gebser*.

The Fourth Circuit studiously followed *Gebser*'s requirements for damages liability in a Title IX sexual harassment case. Under this standard, educational institutions are subject to liability for teacher-student sexual harassment when an appropriate school official has actual knowledge of the harassment and responds to it with deliberate indifference. *Gebser*, 524 U.S. at 277.

In an effort to drum up an issue for this Court, UNC argues that Jennings' description of Coach Dorrance's conduct during team practices and events, and the discomfort and humiliation that she felt, did not give sufficient notice of sexual harassment to Ehringhaus because: a) the comments Jennings complained of "involved Dorrance's interaction with other players;" b) Jennings did not schedule the meeting with the announced purpose of providing notice; and c) the comments could not have constituted sexual harassment because of the "informal" nature of interactions in athletics. Pet. 20-26. All of these arguments are factual and should be decided by a jury. None raise the kind of legal issues that warrant this Court's review.

First, UNC protests (Pet. 24) that Jennings did not complain of the Coach's comments to her—only to others made in her presence. But this argument ignores that Jennings was subject to a sexually hostile environment created by those very comments and other behaviors. Because Coach Dorrance's regular comments "permeated team settings," (Pet. App. 16a) moving from "girl-to-girl-to-girl," (Pet. App. 7a) a jury could reasonably determine that Jennings' "vivid details of Dorrance's sexual comments about his players" and report "that the situation was causing her intense feelings of discomfort and humiliation" provided Ehringhaus with sufficient notice. Pet. App. 22a. Moreover, UNC's argument is contrary to the whole concept of sexual harassment caused by a hostile environment. A hostile *environment* is just that—it is created by the conduct that surrounds the student and that the student must endure—not just the conduct directed specifically at the student. It is precisely because the coach's offensive comments were addressed to so many players that they permeated the environment and harmed Jennings.

This is particularly true here, given that, as the court below noted, "Dorrance was not just any college coach. He was and still is the most successful women's soccer coach in U.S. college history, and he has coached the national team." Pet. App. 14a. And "[a]s the coach, Dorrance controlled everything: team membership, position playing time, and scholarship eligibility." *Ibid.* While UNC emphasizes that other players did not complain, a jury could consider that some players were afraid to complain and risk losing a spot on the "premier women's soccer team in the

country" (Pet. 2).[6] Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 805 (1998) (a supervisor has "power to alter the environment").

Second, UNC suggests (Pet. 22-26) that to provide adequate notice Jennings was required to formally announce to Ehringhaus that she had come to complain about sexual harassment. Certainly such a formal announcement by a college-age student should hardly be needed to alert a knowledgeable attorney—"an official responsible for fielding sexual harassment complaints" (Pet. App. 22a)—that one of its employees was harassing students.[7]

Third, UNC's argument (Pet. 23-26) that it was not on notice of a hostile environment because sexually offensive comments are permitted in school

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[6] Debbie Keller, the team captain and star soccer player who settled with UNC in 2004, testified that Dorrance's sexual "'comments about his affection' for her, together with the inappropriate touching, 'made her skin crawl' and made her 'fe[e]l dirty.'" Pet. App. 14a. But even she "didn't want to tick him off to a point * * * where he would take it out on [her] by not playing [her]." Pet. App. 14-15a.

[7] UNC stresses that Jennings "understood that the conversation was in confidence" (Pet. 23), but this argument further corroborates testimony that she and Keller were afraid of provoking Coach Dorrance. Pet. App. 15a ("[H]ow do you say anything [to stop him?] * * * You are stuck between a rock and a hard place."). And, of course, Ehringhaus was perfectly free to investigate the coach's behavior without divulging how she had learned of the problem. Moreover, even UNC could not contest that it was on notice of the hostile environment following the complaints by Jennings' parents immediately after she was cut from the team. Yet UNC only submitted a "mild letter of reprimand to Dorrance" and a letter of apology to Jennings's father (Pet. App. 8a-9a), taking no steps to identify and address the academic and athletic harm suffered by Jennings.

athletics must also be rejected. Whatever different social mores may govern professional football players and office workers (see *Oncale* v. *Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998)), surely UNC is not claiming that its student-athletes must endure a sexually hostile environment to participate in varsity sports. Cf. *Robinson* v. *Jacksonville Shipyards*, 760 F. Supp. 1486, 1526-27 (M.D. Fla. 1991) ("social context" arguments cannot be used to require women to endure abuse in order to work in a historically male environment). Indeed, UNC itself admitted that the comments made by Dorrance were highly inappropriate. Pet. App. 8a. Moreover, *Oncale* emphasizes that whether there is actionable sexual harassment depends on the entire "constellation of surrounding circumstances, expectations and relationships." *Oncale*, 523 U.S. at 81-82. As the Fourth Circuit properly recognized, these factual questions belong, in the first instance, with the jury. See, *e.g.*, Pet. App. 18a.

In sum, the Fourth Circuit was correct in holding that a jury should examine all of the facts to determine whether UNC had sufficient notice that Coach Dorrance's conduct created a hostile environment. UNC does not present any conflict with *Gebser* that requires correction by this Court.

2. The Decision Below is Consistent with *Davis*.

UNC also erroneously contends that review is warranted because the Fourth Circuit's decision conflicts with the standard established for Title IX damages liability for student-on-student harassment in *Davis*. Pet. 26-28. *Davis* requires that such

harassment must be severe and pervasive enough that it "so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." 526 U.S. at 651.

UNC's repeated claims that Jennings did not suffer the injury required under *Davis* rest on disputed facts, not legal issues. Its assertions that "nothing happened to her while she was a member of the women's soccer team" (Pet. 27) and "[a]ll that happened to Jennings after her conversation with Ehringhaus is that she continued to fully participate without incident in all the activities of the women's soccer program" (*ibid.*) only exemplify its attempt to ignore Jennings' evidence that disputes its contentions. As a jury could more than reasonably find, the degrading and abusive environment that Jennings endured caused her to suffer severe emotional distress during the entire period that she was on the team.[8] Her grades were hurt, her soccer performance was impaired, and ultimately she even lost her chance to continue to be a member of the team. It is difficult to imagine more concrete injury that a student could suffer while on the team.

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[8] UNC's claim (Pet. 28) that under *Davis* a psychological injury, even when reflected in a decline in grades, is insufficient to show that a student was deprived of her educational opportunities is simply wrong. *Davis* stated only that a drop in grades can demonstrate concrete injury but that alone does not *itself* create liability—the severity of the misconduct and the school's knowledge of that misconduct must still be established. 526 U.S. at 652. In any event, Jennings' allegations that her academic and athletic performance suffered, including losing her spot on the soccer team, are the very concrete injuries that could lead a jury to determine that she had been denied access to significant UNC educational programs and benefits.

In yet another attempt to create a legal dispute, UNC claims that there was no academic harm suffered because Jennings' grades did not fall, and in fact improved somewhat. Pet. 16. The fact that Jennings' grades rose slightly during her sophomore year (her academic performance was consistently "barely above passing" Pet. App. 20a.) could reasonably show that she was managing slightly better to endure the hostile environment—not that she suffered no harm. See *ibid.* And, in contrast to *Davis*, 526 U.S. at 634, because the harassment began as soon as she arrived on campus, there is no "pre-harassment" period with which to compare what her grades could have been absent the harassment.

In fact, Jennings' claims present even more severe adverse educational effects than those suffered in *Davis*. Jennings' evidence, which a jury should assess, supports a finding not only of an adverse effect on her grades, as was the case in *Davis*, but also of being cut from an athletic team because of her negatively affected performance, denying her access to a key UNC athletic opportunity.

Moreover, in contrast to *Davis* there was a significant age and power difference between Jennings, a 17-year-old student-athlete, and 45-year-old Coach Dorrance. Indeed, as Justice Kennedy made clear in his dissenting opinion in *Davis*, "[a] teacher's sexual overtures toward a student are always inappropriate." 526 U.S. at 675. And as the Court held in *Gebser*, when a student is subjected to "sexual harassment and abuse by a teacher," that "teacher's conduct is reprehensible and undermines

the basic purposes of the educational system." *Gebser*, 524 U.S. at 292.

Thus, contrary to UNC's statements, the decision below is not the "realization of Justice Kennedy's fears." Pet. 9. The fears he expressed in his dissenting opinion in *Davis* were about cases of student-on-student harassment, not the teacher-student harassment at issue here. *E.g.*, *Davis*, 526 U.S. at 678 ("[A]lmost every child, at some point, has trouble in school because he or she is being teased by his or her peers * * * The majority's test for actionable harassment will, as a result, sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life."); 526 U.S. at 672 (emphasis added) (schools may be exposed to "potentially crushing financial liability for *student conduct* that is not prohibited in clear terms by Title IX").[9]

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[9] UNC also argues that schools have not received adequate notice that they could be held liable for the type of harassment alleged by Jennings under *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, __ U.S. __, 126 S. Ct. 2455, 2459 (2006) and *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Pet. 18. But recipients of federal funds have long been on notice that sexual harassment may trigger a claim for damages where, as alleged here, the educational institution failed to respond to teacher-student harassment. See *Gebser*, *supra*; *Franklin*, *supra*. Moreover, in 1997, the Office for Civil Rights of the Department of Education ("OCR"), which administers the Title IX, issued a Sexual Harassment Guidance that sets forth a recipient's obligations. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (March 13, 1997). That Guidance, which was revised in 2001 after this Court issued its decisions in *Gebser* and *Davis*, notifies all recipients that if they know, or should know, that a hostile environment

At bottom, UNC is unhappy because the Fourth Circuit concluded that Jennings presented sufficient facts to go forward with her case under this Court's stringent requirements. This unhappiness does not support a grant of certiorari. SUP. CT. R. 10.

II. THE COURT'S REVIEW OF THIS CASE WOULD BE PREMATURE

Even if UNC had presented legal issues that were in dispute, this case provides a poor vehicle for resolving any such issues because of its interlocutory posture. There is no final ruling on the merits—the court below found only that UNC was not entitled to summary judgment because of the material facts in dispute. See *Kyles* v. *Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting); *Johnson*, 268 U.S. at 227.

In remanding the case for trial, the Fourth Circuit determined that Jennings had created genuine issues of fact as to whether: 1) Coach Dorrance's "degrading and humiliating conduct was sufficiently severe or pervasive to create a sexually hostile environment" (Pet. App. 18a); 2) that

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exists, they are "responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence." They further have the obligation "to remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively." Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001). Cf. *Davis*, 526 U.S. at 647 (noting that school board associations had warned its members in 1993 that they could be liable for peer sexual harassment). Accordingly, its conditions and obligations as a recipient of federal funds were clear. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 126 S. Ct. at 2459.

environment caused Jennings to become so nervous, anxious, and uncomfortable that it had a negative impact on her academic and athletic performance (Pet. App. 20a); and 3) UNC had adequate notice of the hostile environment (Pet. App. 22a). It is also clear that UNC plans to raise its version of the facts in dispute before the district court. *E.g.* Pet. 5 (noting that "Ehringhaus denie[s] that Jennings ever mentioned sexual harassment on the women's soccer team"); see also Pet. 12, 16-17.

At this time, it is highly speculative as to whether review by this Court will ever be warranted, let alone sought, by UNC. The jury may agree with UNC's version of the facts and the district court may find for UNC. Any appeal by Jennings under such circumstances is highly unpredictable at this point. Similarly, if judgment were entered for Jennings, and if UNC decides to appeal and is then unsuccessful, the nature of any petition for certiorari that UNC might choose to file would likely be very different from the one currently before this Court. It would be shaped by the actual findings of fact and any lower court legal conclusions based on those facts.

In sum, as UNC's fact-dependent arguments demonstrate, this case is the very sort of case that should be decided by a jury, and that decision should not be delayed. In light of the many material disputes of fact, the interlocutory position of this case "itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL F. KONICEK
Konicek & Dillon
21 W. State St.
Geneva, IL 60134
(630) 262-9655

MARCIA D. GREENBERGER
DINA R. LASSOW*
FATIMA GOSS GRAVES
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

Counsel for Respondent

August 24, 2007

* Counsel of Record

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In the

Supreme Court of the United States

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL,
Petitioner,

v.

MELISSA JENNINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

ROY COOPER
North Carolina Attorney General
Christopher G. Browning, Jr., Solicitor General
Thomas J. Ziko,* Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6920
Attorneys for Petitioner

September 5, 2007

**Counsel of Record*

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REPLY TO BRIEF IN OPPOSITION

The new points in the Brief in Opposition do not show that Dorrance's conduct had any concrete, systemic and negative effect on Jennings's educational opportunities; nor do the new points show that UNC had actual notice that Dorrance was illegally discriminating against his players because of their sex. The fact remains that the Fourth Circuit's decision permits Jennings to recover damages under Title IX simply because Dorrance's sexual banter with other players and cursing made her feel bad. Title IX requires plaintiffs to prove more. The Petition squarely presents the questions of whether mere emotional injury – of the type that would permit recovery under 42 U.S.C. § 1983 or Title VII – is enough to prevail on a claim under Title IX and whether a causal conversation with a university administrator about a coach's crude interactions with other players constitutes actual notice that the plaintiff is being discriminated against because of her sex.

I. THE NEW POINTS PRESENTED IN RESPONDENT'S BRIEF IN OPPOSITION DO NOT DEMONSTRATE THAT THE ALLEGED HARASSMENT HAD A CONCRETE, SYSTEMIC, NEGATIVE EFFECT ON PLAINTIFF'S EDUCATIONAL OPPORTUNITIES.

The Petition For Certiorari presents issues unique to the interpretation and application of Title IX of the Education Amendments of 1972, in particular, 20 U.S.C. § 1681(a). This Court has held that, to recover damages on a sexual harassment claim under Title IX, a plaintiff must prove not only that the

harassment caused emotional distress but that the alleged harassment had a concrete, systemic and negative effect on the plaintiff's educational opportunities. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652, 654 (1999). UNC does not deny that Jennings has testified that she suffered emotional distress from Dorrance's alleged sexually harassing behavior. (Pet. App. 20a) If this were a case arising under Title VII or 42 U.S.C. § 1983, plaintiff's testimony about her pain and suffering would be enough to permit a jury to return a judgment for her. *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993) (Title VII bars conduct that would seriously affect a reasonable person's psychological well-being); *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (42 U.S.C. § 1983 permits plaintiffs to recover damages for personal humiliation, mental anguish and suffering, and emotional distress). However, mere emotional injury is not enough to recover damages under Title IX. Instead, before an educational institutional can be exposed to damages under Title IX, a plaintiff must present evidence that, following actual notice of sex discrimination, the institution was deliberately indifferent to continuing sexual discrimination that had a concrete, systemic and negative effect on the plaintiff's educational opportunities.

Jennings concedes that she must present specific evidence that she suffered such a concrete harm. (Br. in Opp'n, p. 12) In holding that Jennings had carried that burden, the Fourth Circuit Court of Appeals cited Jennings's testimony that Dorrance's alleged sexual harassment prevented her from attaining what she believed was her full potential, either in the class room or on the playing field. As UNC demonstrated in its Petition, however, the record shows that Jennings's grades

improved while she was on the soccer team and she testified that she believed she had done well on the team. On this record, Jennings's claim that she did not do as well as she thought she might have if her emotional state were better is entirely speculative. Jennings cannot even show that her grades declined – an objective event that even the majority in *Davis* held was inadequate to show a violation of Title IX. *Davis*, 526 U.S. at 652. Jennings's self serving speculation regarding the effect she thought Dorrance's conduct had on her ability to reach what she consider to be her full academic and athletic potential is clearly not the concrete, systemic and negative effect that the *Davis* Court held was necessary to prevail on a claim for damages under Title IX.

In an attempt to prove that Jennings did suffer a concrete loss of educational opportunity, the Brief in Opposition references two events – Dorrance's decision to cut Jennings from the team in the spring of 1998 and Jennings's decision to withdraw from UNC after she filed the complaint in this case. While those concrete events affected Jennings's educational opportunities at UNC, Jennings did not allege either of those events as consequences of Dorrance's sexual harassment, the Fourth Circuit did not rely upon those events in its opinion, and they are logically irrelevant to the issues presented in the Petition.

A. Dorrance's Decision to Cut Jennings from the Team Is Not Relevant to the Issues Presented in the Petition.

In her amended complaint, Jennings did allege that she was cut from the team in retaliation for charges of sexual

harassment *that others had made on her behalf.* That claim did not survive summary judgment for several reasons: (1) other than Jennings's testimony regarding her conversation with Ehringhaus there was no evidence that anyone made any complaints of sexual harassment on behalf of Jennings or any other player before Dorrance cut Jennings from the team; (2) there was no evidence that Dorrance was aware that Jennings had told Ehringhaus that she was uncomfortable with Dorrance's interactions with other players; and (3) there was no evidence that Dorrance's decision to cut Jennings was based on anything other than Jennings's objectively poor athletic and academic performance. Jennings's attempt to recast Dorrance's decision to cut her from the team as a concrete consequence of his alleged sexual harassment is fundamentally flawed.

Dorrance's decision to cut Jennings from the team is unrelated to Jennings's claims of sexual harassment. This is not a case of constructive discharge; Jennings did not quit the UNC women's soccer team because she could not stand Dorrance's sexual harassment. In fact, in response to UNC's argument that Jennings's desire to remain on the team proved that Dorrance's alleged harassment was neither severe nor pervasive, the Fourth Circuit was constrained to hold that the fact that Jennings was disappointed to be cut from the team did not affirmatively prohibit her from prevailing on her Title IX claim. (Pet. App. 20-21a)

Although it is a concrete event which deprived Jennings of the opportunity to participate on the team, Dorrance's decision to cut Jennings from the team does not satisfy Jennings's obligation to provide evidence that she suffered a concrete deprivation of educational opportunities *as a result of*

UNC's deliberate indifference to alleged sexual harassment.

B. Jennings's Decision to Leave UNC after She Filed the Complaint in this Case Is Irrelevant to the Issues Presented in the Petition.

Jennings's decision to leave UNC after she had been cut from the team and after she had filed the lawsuit is not a concrete consequence of UNC's deliberate indifference to Dorrance's alleged sexual harassment. Although she testified in her deposition that she left UNC after she filed her complaint because harassing telephone calls made her fear for her safety, Jennings never amended or supplemented the complaint to allege those events or to claim that UNC was responsible for the telephone calls.

Jennings's decision to leave UNC did result in a concrete loss of educational opportunities. However, Jennings's decision to leave UNC because third parties harassed her about filing the complaint is not evidence that Jennings suffered a concrete loss of educational opportunities *as a result of UNC's deliberate indifference to Dorrance's alleged sexual harassment.*

II. JENNINGS'S RELIANCE ON UNC'S RESPONSES TO ALLEGATIONS OF SEXUAL HARASSMENT ARE LEGALLY IRRELEVANT TO THE ISSUES BEFORE THE COURT.

After Jennings was cut from the team and after her parents complained that Dorrance had made inappropriate comments to the players on the team, UNC and Dorrance wrote

to Jennings's father and apologized for Dorrance's "inappropriate . . . involvement in (sexual) discussions." (Pet. App. 8a) UNC also issued what the Fourth Circuit characterized as "a mild letter of reprimand" to Dorrance in which it warned him that it was "inappropriate for [Dorrance] to have conversations with members of [the] team (individually or in any size group) regarding their sexual activity." (Pet. App. 9a) The Brief in Opposition notes that as part of a subsequent settlement, UNC and Dorrance issued another letter to Keller which contained an apology similar to the apology it had given to Jennings. (Br. in Opp'n, p. 12)

The Brief in Opposition references this correspondence as evidence that Dorrance's behavior was "undisputedly improper." (Br. In Opp'n, p. 12) In fact, this correspondence is irrelevant to the issues before the Court.

First, the fact that UNC settled with Jennings's co-plaintiff Debbie Keller is totally irrelevant to the merits of Jennings's claims. Keller's complaint raised several claims other than the Title IX claim at issue in this case. Furthermore, the Rules of Evidence prohibit courts from considering settlements as evidence of liability. Fed. R. Evid. 408(a). Therefore, UNC's settlement with Keller is irrelevant to this case.

Second, UNC's decision to issue Dorrance a reprimand is a subsequent remedial measure that is not admissible to prove culpable conduct. Fed. R. Evid. 407.

Finally, rather than advancing her arguments, Jennings's reference to the apologies and reprimand highlights the difference between sexual harassment that violates Title IX and inappropriate conduct which warrants an institutional response.

In order to hold UNC liable under Title IX, Jennings must show that UNC had actual notice of sexual harassment which constitutes illegal sexual discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998). On the other hand, UNC has an interest in its coaches and faculty setting examples for students and in creating and maintaining an educational environment that meets high standards for civil discourse and conduct. The fact that UNC determined that Dorrance's conduct fell short of its high standards for coaches and faculty does not mean that UNC believed that Dorrance's conduct was illegal or that its failure to take action earlier constituted deliberate indifference to illegal sexual discrimination of Jennings or any other player.

Federal anti-discrimination statutes are not "general civility code[s]." *Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998). The law does not require coaches and faculty to limit their speech and personal interactions to standards that would be accepted in the most polite societies. However, when UNC exercises its authority to hold its coaches to a higher standard of conduct, it should not have to fear that its decisions will subsequently compromise its legal position.

In this case, UNC decided that Dorrance had violated its standards of conduct for coaches. In light of that decision, UNC deemed it appropriate to apologize to Mr. Jennings and Ms. Keller and to reprimand Dorrance. That is not evidence that UNC determined that Dorrance illegally discriminated against Jennings or any other player because of her sex. More important to the present issue, it is not evidence that UNC agreed that the conduct Jennings allegedly described in her conversation with the UNC General Counsel Susan Ehringhaus constituted actual notice that Dorrance was sexually harassing

players because of their sex in violation of their rights under Title IX.

III. THE FOURTH CIRCUIT'S DECISION IN THIS CASE IS IN CONFLICT WITH THE SEVENTH CIRCUIT.

In *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817 (7th Cir. 2003), the Seventh Circuit found that despite evidence that the plaintiff had suffered significant psychological injury from sexual harassment, including bed-wetting, insomnia, nightmares, and loss of appetite, her grades remained steady and her absenteeism from school did not increase. *Id.* at 823. Therefore, the Seventh Circuit held that there was no evidence plaintiff had been denied concrete educational opportunities in violation of her rights under Title IX. *Id.* The Seventh Circuit decision conflicts with the Fourth Circuit's holding that Jennings's alleged psychological injury was sufficient in and of itself to make out a claim for damages under Title IX even though the record shows that her grades improved and she continued to fully participate on the soccer team. Jennings attempts to avoid the conflict by reference to irrelevant distinctions between this case and *Gabrielle M.*

The fact that *Gabrielle M.* involved alleged student-on-student sexual harassment is irrelevant. Teacher-on-student sexual harassment may be more likely to violate Title IX because such conduct is more likely to result in a concrete, systemic and negative effect on educational opportunities. *Davis*, 526 U.S. at 653. But, the mere fact that Jennings has alleged that she was sexually harassed by a coach does not absolve her of the obligation to present evidence that the

coach's conduct deprived her of concrete educational opportunities.

The fact that the school in *Gabrielle M.* immediately responded to the student's parents' complaints is also irrelevant to the issues raised in the Petition. Proof that the institution was deliberately indifferent to actual knowledge of sexual harassment is an essential element of a Title IX sexual harassment claim. *Gebser*, 524 U.S. at 277. However, an institution that is deliberately indifferent to actual notice of sexual harassment is only liable for any subsequent illegal harassment that had a concrete, systemic and negative impact on the plaintiff's educational opportunities. The Seventh Circuit relied upon the absence of such proof to rule in favor of the defendants. The Fourth Circuit decision that Jennings could proceed with her claims despite the absence of such evidence places it in direct conflict with the Seventh Circuit.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

ROY COOPER
Attorney General

Christopher G. Browning, Jr.
Solicitor General

Thomas J. Ziko*
Special Deputy Attorney General
* Counsel of Record

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